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REPORTS

John Smith
31. Bussinghall St
CASES

ARGUED AND DETERMINED

IN THE

Courts of Common Pleas

AND

Exchequer Chamber,

WITH

TABLES OF THE NAMES OF THE CASES, AND THE PRINCIPAL
MATTERS.

BY JOHN BAYLY MOORE,

OF THE INNER TEMPLE, ESQ.

VOL. IV.

CONTAINING THE CASES FROM MICHAELMAS TERM 60 GEO. III.
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JUL 15 1901

JUDGES
OF THE
COURT OF COMMON PLEAS,

DURING THE PERIOD CONTAINED IN THIS VOLUME.

The Right Hon. Sir ROBERT DALLAS, Knt. Lord Chief Justice.
The Hon. Sir JAMES ALLAN PARK, Knt.
The Hon. Sir JAMES BURROUGH, Kpt.
The Hon. Sir JOHN RICHARDSON, Knt.



TABLE

OF THE

CASES REPORTED

IN THE FOURTH VOLUME.

The Cases which are printed in *Italics* were cited from *MS. Notes*.

A.	Page		Page
ABRAHAMs, Harper v.	3	Blagrove, Carvick v.	303
<i>Anderson v. Hamilton</i>	593, n.	Bland, Vouchee; Hinde, De-	348
Anonymous	2	mandant; Hinde, Tenant	348
Armet v. Innes	150	Bolton v. Eyles	425
Arnold v. Revoult	66	Booth, Arton v.	192
Arton v. Booth	192	Brandon v. Hubbard	367
Astor, Gunter v.	12	Breach, Demandant; Hewitt,	113
Auty, Teall v.	542	Tenant; Brierley, Vouchee	113
		Brierley, Vouchee; Breach,	113
		Demandant; Hewitt, Tenant	113
B.		Briggs v. Dixon	414
Barlow v. Broadhurst	471	Brittain v. Kinnaird	50
Barlow v. Leckie	8	Broadhurst, Barlow v.	471
Baxendale, Tenant; Tatham,		Brooke v. Enderby	501
Demandant; Tabor, Vouchee	481	Brown, Deforciant; Collins,	170
Beaumont, Vouchee; Wil-		Plaintiff	170
liamson, Demandant; Meg-		Brown v. Howard	508
gison, Tenant	49. 171	Buckland v. Butterfield	440
Bendyshe v. Pearce	99	Buckle, London Assurance	153
Benett v. Coster	110	Company v.	153
Benson, Johnston v.	90	Burnell v. Minot	340
Bentinck, Home v.	563	Burton, Sampson v.	515
Berney v. Davison	126	Butt v. Conant	195
Berney v. Vynner	322	Butterfield, Buckland v.	440
Bishop, Chitty v.	413	Butterton v. Furber	296
		Butts v. Swan	484

TABLE OF CASES REPORTED.

C.	Page
Carvick v. Blagrave . . .	303
Chitty v. Bishop . . .	413
Clark, Tomlinson v. . .	4
Clarke v. Davey . . .	465
Coggs, Croft v. . .	65
Collins, Plaintiff; Brown, Deforciant . . .	170
Colyer v. Speer . . .	473
Conant, Butt v. . .	195
Cooke v. Maxwell . . .	582
Coster, Benett v. . .	110
Croft v. Coggs . . .	65
Cromack v. Heathcote . .	357
Crutchley, Selby v. . .	280

D.	Page
Davey, Clarke v. . .	465
Davison, Berney v. . .	126
De Tastet, Lopes v. . .	266. 424
Dillon, Halford v. . .	381
Dinsdale v. Eames . . .	350
Dixon, Briggs v. . .	414
Doe, d. Evans v. Roe . .	469
Doe, d. Macdougall v. Roe	20
Doe, d. Seabrook v. Roe .	350
Drake v. Rogers . . .	402

E.	Page
Eagle, Watson v. . .	190
Eames, Dinsdale v. . .	350
Edge, Demandant; Taylor, Tenant; Warren, Vouchee	514
Edmunds, Hearn v. . .	15
Enderby, Brooke v. . .	501
Evans, Doe, d. v. Roe . .	469
Eyles, Bolton v. . .	425

F.	Page
Forbes, Solly v. . .	448
Freeman, Hales v. . .	21
Furber, Butterton v. . .	296

G.	Page
Galliers, Peploe v. . .	163
Girling, Wells v. . .	78
Gorham, Pepper v. . .	148
Graham, Plaintiff; —, Deforciant . . .	295
Graham, Sands v. . .	18
Gray v. Shilling . . .	371
Grillard v. Hogue . . .	313
Grimes v. Joseph . . .	380
Guichard v. Morgan . .	36
Gunter v. Astor . . .	12
Gurley, Heath v. . .	149

H.	Page
Hale v. Small . . .	415
Hales v. Freeman . . .	21
Halford v. Dillon . . .	381
Hamilton, Anderson v. .	593, n.
Hammond, Spragg v. . .	431
Harper v. Abrahams . .	3
Harris v. Lunell . . .	10
Hay, Monkhouse v. . .	549
Hearn v. Edmunds . . .	15
Heath v. Gurley . . .	149
Heathcote, Cromack v. . .	357
Hempson v. Josselyn . .	297
Hewitt, Tenant; Breach, Demandant; Brierley, Vouchee	113
Hinde, Demandant; Hinde, Tenant; Bland, Vouchee	348
Hogue, Grillard v. . .	313
Home v. Bentinck . . .	563
Hossack v. Masson . . .	861
Howard, Brown v. . .	508
Howell v. Wyke . . .	167
Hubbard, Brandon v. . .	367

I. & J.	Page
Innes, Armet v. . .	150
James, Merest v. . .	327
Johnston v. Benson . . .	90
Jones, Ex parte . . .	347
Joseph, Grimes v. . .	380
Josselyn, Hempson v. . .	297

TABLE OF CASES REPORTED.

K.		Page				Page	
Kingston v. Llewellyn	. . .	317		Pearce, Bendyshe v.	. . .	99	
Kinnaird, Brittain v.	. . .	50		Pearson, <i>In re</i>	. . .	366	
Knights v. Quarles	. . .	532		Peckham, Willis v.	. . .	300	
L.				Peploe v. Galliers	. . .	163	
Law, Morley v.	. . .	369		Pepper v. Gorham	. . .	148	
Leckie, Barlow v.	. . .	8		Q.			
Levin v. Weatherall	. . .	116		Quarles, Knights v.	. . .	532	
Lingham v. Warren	. . .	409		R.			
Llewellyn, Kingston v.	. . .	317		Rees, Walters v.	. . .	34	
Lombe, Steward v.	. . .	281		Regulæ Generales	. . .	2. 320	
London Assurance Company				Revoult, Arnold v.	. . .	66	
v. Buckle	. . .	153		Roe, Doe, d. Evans v.	. . .	469	
Lopes v. De Tastet	. . .	266, 424		Roe, Doe, d. Macdougall v.	. . .	20	
Lunell, Harris v.	. . .	10		Roe, Doe, d. Seabrook v.	. . .	350	
M.				Rogers, Drake v.	. . .	402	
Macdougall, Doe, d. v. Roe	. . .	20		Rucker, Wetter v.	. . .	172	
M'Cullom, Sanderson v.	. . .	5		S.			
Mahon v. Martinez	. . .	356		Salmon v. Watson	. . .	73	
Martinez, Mahon v.	. . .	356		Sampson v. Burton	. . .	515	
Masson, Hossack v.	. . .	361		Sanderson v. M'Cullom	. . .	5	
Maxwell, Cooke v.	. . .	582		Sanderson v. Symons	. . .	42	
Meggison, Tenant; William-				Sands v. Graham	. . .	18	
son, Demandant; Beau-				Seabrook, Doe, d. v. Roe	. . .	350	
mont, Vouchee	. . .	49. 171		Selby v. Crutchley	. . .	280	
Memoranda	. . .	1. 115. 321		Shilling, Gray v.	. . .	371	
Merest v. James	. . .	327		Shynn, Tomlinson v.	. . .	505	
Mills, Walker v.	. . .	343		Small, Hale v.	. . .	415	
Miot, Burnell v.	. . .	340		Smith, <i>In re</i>	. . .	319	
Monkhouse v. Hay	. . .	549		Solly v. Forbes	. . .	448	
Morgan, Deforciant; Palmer,				Speer, Colyer v.	. . .	473	
Plaintiff	. . .	162		Spragg v. Hammond	. . .	431	
Morgan, Guichard v.	. . .	36		Steward v. Lombe	. . .	281	
Morley v. Law	. . .	369		Swan, Butts v.	. . .	484	
Myers v. Wills	. . .	147		Symons, Sanderson v.	. . .	42	
P.				T.			
Palmer, Plaintiff; Morgan,				Tabor, Vouchee; Tatham,			
Deforciant	. . .	162		Demandant; Baxendale,			
Patmore, Tripp v.	. . .	470		Tenant	. . .	481	

TABLE OF CASES REPORTED.

	Page	W:	Page
Tatham, Demandant; Bax-		Walker v. Mills	343
endale, Tenant; Tabor,		Walters v. Rees	34
Vouchee	481	Warren, Lingham v. . . .	409
Taylor, Tenant; Edge, De-		Warren, Vouchee; Edge, De-	
mandant; Warren, Vou-		mandant; Taylor, Tenant	514
chee	514	Watson v. Eagle	190
Teall v. Auty	542	Watson, Salmon v. . . .	73
Thacker, Williams v. . . .	294	Weatherall, Levin v. . . .	116
Tomlinson v. Clark	4	Wells v. Girling	78
Tomlinson v. Shynn	505	Wetter v. Rucker	172
Tripp v. Patmore	470	Wilks, Variables v. . . .	339
		Williams v. Thacker	294
		Williamson, Demandant;	
		Meggison, Tenant; Beau-	
		mont, Vouchee	49. 171
V.		Willis v. Peckham	300
Venables v. Wilks	339	Wills, Myers v.	147
Vyner, Berney v.	322	Wyke, Howell v.	167

C A S E S
ARGUED AND DETERMINED
IN THE
Courts of Common Pleas
AND
Exchequer Chamber,
IN
MICHAELMAS TERM,

IN THE
SIXTIETH YEAR OF THE REIGN OF GEORGE III.

MEMORANDA.

I**N** the course of the last Vacation, Sir *Robert Gifford*, Knight, His Majesty's Solicitor-General, was promoted to the office of Attorney-General to His Majesty: And

John Singleton Copley, Esquire, one of His Majesty's Serjeants-at-Law, having resigned the office of Chief Justice of *Chester*, was appointed His Majesty's Solicitor-General, and afterwards knighted accordingly.

1819.

REGULA GENERALIS.

Saturday,
Nov. 6th.

It is ordered, That from and after *Thursday*, the eleventh day of *November* instant, every notice for justifying bail in person shall be served before eleven o'clock in the forenoon of the day on which, according to the present practice, such notice ought to be served; except where an order of the Court for further time shall have been obtained, in which case it shall be sufficient to serve the notice before three o'clock in the afternoon of the day on which such order shall be granted; and in all the cases aforesaid, the affidavit of service shall specify the time of day at which such notice shall have been served.

By the COURT.

Saturday,
Nov. 6.

ANONYMOUS.

The *essoign* day cannot be considered as a day within the Term, on which an application can be made to enter up judgment on an old warrant of attorney, on an affidavit stating the party to be alive on that day.

Mr. Serjt. *Pell* moved to enter up judgment on an old warrant of attorney, on an affidavit which stated that the defendant was alive on the third instant, being the *essoign* day of this Term.

But the Court referred to the rule laid down by them in the last Term (a), and held, that as it was necessary for the affidavit to state that the defendant was alive on a day *within the Term* in which the motion is made, the *essoign* day could not be considered as being within the Term for that purpose.

The learned Serjeant therefore took nothing by his motion,

(a) See *Hamley v. Allaston*, ante, vol. iii. p. 606.

1819.

HARPER and Another, Assignees of FITZGERALD, a Bankrupt, v. ABRAHAMS.

Saturday,
Nov. 6th.

THIS was an action of trover for a ship. At the trial of the cause before Lord Chief Justice *Dallas*, at *Westminster*, at the Sittings after the last Term, the plaintiffs obtained a verdict for £3000, subject to a reference, by which an arbitrator was directed to inquire what alteration had taken place in the value of the ship since the time of the conversion. It appeared that a person, by the name of *St. Barbe*, had been duly appointed an arbitrator for this purpose, and that he died shortly after such appointment, without making his award; that it was agreed between the parties, that his partner, *Green*, should be appointed in his stead, but that when he was about to make his award, the defendant's attorney gave him notice not to do so, and objected to his being substituted for *St. Barbe*. Under these circumstances, Mr. Serjt. *Taddy* now moved, that the *postea* might be delivered to the plaintiff for £3000, or that the name of *Green* might be inserted in the order of reference, instead of *St. Barbe*.

Where plaintiff obtained a verdict, subject to a reference, and the arbitrator died before making his award, and the parties agreed that another should be substituted in his stead, and one of them afterwards objected to such substitution:—The Court refused to interfere; as the death of the arbitrator had the effect of opening the cause, and as execution could not be sued out on the verdict, on account of such death.

But, *Per Curiam*.—Although the refusal by the defendant's attorney was contrary to good faith, we cannot grant this application—such an one has never been made before. As the verdict was subject to a reference, the death of the arbitrator, without having made his award, has the effect of opening the cause, and it may be re-tried. It is quite clear, that judgment cannot be entered up, or execution sued out on the verdict as it now stands, on account of the death of the arbitrator.

Refused.

1819.

HARPER
v.
ABRAHAM.

Mr. Serjt. *Taddy* afterwards obtained a rule *nisi*, that the *postea* should be delivered to the plaintiff for £3000, with liberty to reduce it, and enter a verdict for one shilling, which was afterwards made

Absolute.

Saturday,
Nov. 6th.

TOMLINSON and Others v. CLARK.

If a defendant be arrested by an attorney for fees, and a bill of costs be delivered to him without being signed:—He cannot be discharged out of custody on entering a common appearance, as the want of such signature will be a defence to the action on producing the bill at the trial.

THE plaintiffs, who are attorneys, arrested the defendant for fees due to them, and for which they had delivered their bill of costs. Mr. Serjt. *Vaughan* now moved for a rule *nisi*, that the defendant might be discharged out of custody on entering a common appearance, on an affidavit which stated that the bill on which the action was brought was not signed according to the statute 2 *Geo. 2. c. 23. s. 23*, made perpetual by 30 *Geo. 2. c. 19. s. 75. (a)*. He therefore submitted that the plaintiffs were not justified in holding the defendant to bail.

But, *Per Curiam*.—This is matter of defence, and not a subject for discharging a defendant out of custody. If he give the bill in evidence at the trial, and the signature of the plaintiffs be not attached to it, they must consequently be nonsuited.

Rule refused.

(a) By which it is enacted, that "No attorney shall commence any action or suit for the recovery of fees, at law or in equity, until the expiration of one month after the delivery of his bill of fees to the party to be charged therewith; which bill should be subscribed with the proper hand of such attorney."

1819.

SANDERSON and Another v. M'CULLOM.

Monday,
Nov. 8th.

THIS was an action of *assumpsit*, on a policy of insurance underwritten by the defendant, on the ship *Venerable*, in February, 1818—in which, the voyage was described “at and from *Liverpool* to the ship’s port or place of discharge and loading in *Africa* and the *African* islands, and during her stay there, and at and from thence, back to *Liverpool*, or the first port or place of discharge in the United Kingdom; and that it might be lawful for her in that voyage to proceed and sail to, and touch and stay at, any ports or places whatsoever and wheresoever, as above, with liberty to *sell, barter, and exchange goods*, and load, unload, and reload goods, at any or all of the ports and places she might call at and proceed to.”—At the trial of the cause before Lord Chief Justice Dallas, at Guildhall, at the Sittings after the last Term, it appeared that the vessel was wrecked during her homeward voyage, and that in the body of the policy the words, “*sell, barter, and exchange goods*,” were interlined, with the assent of some of the underwriters; and that in the description of the risk therein, the words “*and trade*” were also interlined, after those of “*during her stay*,” and that a copy of the policy was made when the goods were insured—but no proof was adduced when the interlineations took place. The defendant, however, called a witness, who swore that the words “*and trade*” were not inserted in the policy when he signed it, although he had before put his signature to the former interlineation. It was also in evidence, that another underwriter declined to subscribe, as the words “*and trade*” had been introduced. For the defendant it was insisted, that

A policy of insurance was effected on a ship from *Liverpool* to *Africa*, and during her stay there, and from thence back to *Liverpool*, with liberty to proceed to and stay at any ports of discharge and loading in *Africa*, to sell, barter, and exchange goods, and load, unload, and reload goods, at all or any of the ports she might call at and proceed to. After the execution of the policy, the assured inserted the words “*sell, barter, and exchange goods*,” as well as the words “*and trade*,” after those of “*during her stay*,” and which were acquiesced in by several of the underwriters: Held, that the alteration was unimportant, and therefore did not avoid the policy against an underwriter who

had subscribed his initials to the words “*sell, barter, and exchange goods*,” but had not assented to the insertion of the words “*and trade*,” although his initials were subscribed to them.

1819.
 SANDERSON
 v.
 McCULLON.

those alterations avoided the policy. The Jury, however, found that there was a liberty to trade, independently of those words, and accordingly found a verdict for the plaintiffs.

Mr. Serjt. *Lens* now moved for a rule *nisi*, that this verdict might be set aside, and a nonsuit entered, on the ground that those interlineations had vacated the policy. He submitted, that no liberty to trade was given by the policy as it originally stood, and that if the words "*and trade*" had not been subsequently introduced, the policy would have been confined to the loading and unloading of the ship, whereas, by the latter alteration, it extended to trading also. He contended, that if either of the alterations were material, and made without the consent of the defendant, the policy would be destroyed as to him; that if the latter alteration had been accidental, there would have been a material distinction, but that the introduction of the words "*and trade*" alone warranted a trading. Although the defendant had subscribed his signature to the former interlineation, still the policy was not complete as to him, until he had inserted his initials, to shew his approbation of the insertion of the latter. He cited the cases of *Langhorn v. Cologan* (a), and *Fairlie v. Christie* (b), to shew that a material alteration in a policy, without the consent of the underwriter, vacates the policy as to him.

Lord Chief Justice DALLAS.—This case does not appear to me to fall within the rule, where it has been decided that a material alteration avoids a policy. After the interlineations in question were made, the underwriters were requested to subscribe to them. If they refused to do so, they would still be liable on the policy as it originally stood. The alterations here stood as to the other underwriters, and they paid the loss without hesitation; and the only question at the trial

(a) 4 Taunt. 330. — (b) Ante, vol. i. p. 114. S. C. 7 Taunt. 416.

was, whether the alterations were made without the assent of the defendant. The Jury were of opinion, that the vessel had liberty to trade without the insertion of the latter words, and it was in evidence, that it was usual, under a policy of this description, to trade to *Africa* under the general terms previously contained in it. The alteration, therefore, is immaterial with respect to the defendant, as he would have been bound without it. Besides, several other underwriters consented to it without any hesitation—and therefore, such alteration can apply only to those who were bound by subscribing their initials after the latter words had been introduced.

1810:

 SANDERSON
 v.
 M'CULLON.

Mr. Justice PARK concurred.

Mr. Justice BURROUGH was absent.

Mr. Justice RICHARDSON.—The defendant not only recognised, but adopted one of the interlineations, by putting his initials to the policy after it was inserted. The original policy expresses on the face of it a contract with several individuals, as underwriters; if, therefore, some of them consent to the alteration after it is executed by them, and others refuse to do so, those who consent make the altered instrument their own, but those who do not, remain liable on their original contract. In *Langhorn v. Cologan*, the plaintiff declared as if the subject-matter of the insurance had been added and adopted. Here, however, it has been contended, that the interlineation of the words "*and trade*" have avoided the policy as against the defendant, and those other underwriters who have not consented to it; but as they have not subscribed their initials, or assented to the insertion of those words, the original policy stands in force as against them, as they had an election to adopt such interlineation or not.

Rule refused.

1819.

Monday,
Nov. 8th.

BARLOW and Another v. LECKIE.

A. at *Rouen* ordered goods of *B. and Co.* to be shipped at *Bristol*, and before the vessel sailed he directed his agents in *London* to insure her. *B. and Co.* having shipped the goods, caused another insurance to be effected, they being ignorant of the former insurance by *A.* Neither of the policies were cancelled, but that effected by *A.* was void on the ground of concealment. In an action against an underwriter by *B. and Co.* on the policy effected by them: Held, that they were entitled to recover, *A.*'s agent having directed it to be effected;—and that the Jury were warranted in finding that he had an implied authority so to do.

THIS was an action of *assumpsit*, on a policy of insurance effected by the plaintiffs on the 2d of *January*, 1819, on iron in bars, by the ship *L'Olivier*, on a voyage from *Bristol* to *Rouen*, and underwritten by the defendant for £200. The declaration contained two counts, the first averring the interest to be in the plaintiffs, and the other in one *Lewis Poupellier*. The defendant paid the premium into Court, on the count for money had and received. At the trial of the cause before Lord Chief Justice *Dallas*, at *Guildhall*, at the Sittings after the last Term, the following facts were admitted:—That *Poupellier*, a resident at *Rouen*, ordered the iron in question of the plaintiffs, who resided at *Bristol*, and that they shipped it on his account; that before the sailing of the ship from *Rouen* to bring the iron, *Poupellier* ordered an insurance to be made on it for the voyage in question, by a letter written on the 15th *September*, 1818, to *Zwinger and Co.* his agents in *London*, who accordingly caused a policy to be effected on the 18th of that month, for the purpose of covering the iron. The vessel did not sail from *Rouen* as early as was expected, but, in *January* 1819, the iron was put on board by the plaintiffs, at *Bristol*, on account of *Poupellier*, and they not being aware that he had effected his own insurance, sent instructions to their broker to effect the policy on which the present action was brought. The plaintiffs having afterwards learnt that *Poupellier* had previously insured the iron himself, directed their broker to apply to the underwriters to cancel the policy effected for them, and get a return of the premium from the underwriters, which was not done. The vessel was totally lost by wreck, when the assured called on the underwriters of the first policy to pay the loss, which they refused to do, on the ground that the contents of the letter of order had not been

communicated to them, when they called on the underwriters, under the policy in question, for a total loss. For the defendant it was insisted, that the plaintiffs were not entitled to recover, as they effected the policy without any orders, or express or implied authority from *Poupellier*, who alone was interested in the iron. The Jury, however, found that there was an implied authority for them to do so, and accordingly found a verdict for the plaintiffs.

1819.

BARLOW
v.
LECHER.

Mr. Serjt. *Vaughan* now moved for a rule *nisi*, that this verdict might be set aside, and a new trial granted, on the above objection, and distinguished this case from that of *Hagedorn v. Oliverson* (a); as there, the party who was interested, adopted the act of the person who made the insurance, and as he took on himself to insure for the party interested, he would have been liable to pay the premium to the underwriters, whether he had the authority of such party or not, as the latter had the option of adopting the policy afterwards; and he submitted, that if no loss had happened, the plaintiffs might have obtained a return of the whole of the premium from the underwriters on the policy, and that the assured could not be liable to pay any premium thereon to any one.

Lord Chief Justice DALLAS.—It appeared at the trial, that the policy in question was effected by the plaintiff's clerk, who received instructions to do so from *Poupellier*'s clerk, and I left it to the Jury to determine whether the latter was authorised by *Poupellier* to give such instructions. They found that he was; and I am of opinion they were perfectly right in so finding. The only question is, whether the plaintiffs had an express or implied authority from *Poupellier* to effect the policy. It is true there was no express autho-

1812.
 ~~~~~  
 EARLOW  
 v.  
 LACKIE.

rity; but his clerk might act as a general agent, and this order therefore would be within the scope of his authority; but beyond this, it has been adopted by *Poupellier* himself, and whether such adoption be made by previous authority or subsequent acquiescence, I have no doubt but that the *Jury* were perfectly warranted in finding that the clerk had an implied authority to cause the policy to be effected, and therefore that their verdict cannot be disturbed.

Mr. Justice PARK concurred.

Mr. Justice BURROUGH was absent.

Mr. Justice RICHARDSON.—I think the *Jury* were warranted in finding that the policy was effected by the plaintiffs with the authority of *Poupellier*, and that his agent was empowered by him to make the order.

Rule refused (a).

(a) See *Grant v. Hill*, 4 *Trust*. 380. and *Bell v. Jutting*, ante, vol. i. page 155.

Wednesday,  
 Nov. 10th.

HARRIS and Another, Assignees of BENDALL, a Bankrupt,  
 v. LUNELL and Others.

*A.* sold goods to *B.* to be paid for by a bill at two months, and not being able to obtain

it from *B.* and doubting his solvency, *A.* employed his broker to repurchase them in his own name, which was done, although at a great loss. *B.* afterwards became bankrupt, without knowing that the goods had been repurchased by the broker on account of *A.* In an action of trover, brought by the assignees of *B.* against *A.* for the goods:—Held, that they were not entitled to recover, as the transaction was not fraudulent on the part of *A.*

THIS was an action of trover for 1180 bushels of barley. At the trial of the cause before Mr. Baron *Graham*, at the last Assizes at *Bristol*, it was proved that *Bendall* became bank-

rupt on the 22d of *March* last, and that, on the 22d of *January* preceding, the defendants sold the barley in question to him, at the rate of 7*l.* 3*s.* per bushel, to be paid for by his bill, at two months, from the 1st of *February* then next; that the defendants on that day, and frequently afterwards, called on the bankrupt for the bill, but were unable to obtain it, and on learning that he was in insolvent circumstances, they employed a broker to repurchase the barley for them, who, on the 11th of *March*, bought it from the bankrupt at the same price he gave for it, although it had fallen one shilling per bushel in the market since he purchased it of the defendants, and the broker was to pay for it by his bill at two months. No invoice or bill of parcels was made out. On the cross examination of one of the defendants before the commissioners, he admitted that the barley was originally sold to the bankrupt, who was to pay for it on the terms above mentioned; but that when he was called on for the bill, he wanted an extension of credit, when the defendants ordered their broker to repurchase it in his own name, and at all events, and take it to his own warehouse, without letting the bankrupt know that the defendants were in fact the purchasers, and they said that they would bear the loss if any occurred. It was further proved, that the bankrupt ordered the broker to pay the defendants the money due to them, although he had received no intimation whatever that the purchase in question was made on their account.—The learned Baron was of opinion, that there was not sufficient evidence to shew that the bankrupt was privy to this transaction, neither could it be considered as fraudulent on the part of the defendants; but he left it to the Jury to consider whether it were so or not. They thought not, and accordingly found a verdict for the defendants.

1819.

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HARRIS  
v.  
LUNELL,

Mr. Serjt. *Taddy* now moved for a rule nisi, that this verdict might be set aside, and a new trial granted, and insisted that the defendants had been guilty of fraud to procure the

1819.

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**HARRIS**  
 v.  
**LUNELL.**

barley from the bankrupt, through concealed and indirect means; that it was not necessary for the bankrupt himself to be privy to the transaction, or concur with it, so as to make it fraudulent within the spirit of the bankrupt laws; and he cited the case of *Noble v. Adams* (a).

But the Court (b) observed, that that case did not bear the most distant analogy to the present, as here there was no evidence whatever of a fraudulent transaction. The barley was originally sold and delivered by the defendants to the bankrupt, who wished an extension of time of payment beyond the terms agreed on. The defendants then finding they could not obtain payment, or a bill, from the bankrupt, employed their broker to repurchase, and there can be no possible objection to their endeavouring to gain a repossession of their property through these means.

Rule refused.

(a) 2 Marsh. 366. S. C. 7 Taunt. 59.

(b) *Absente*, Mr. Justice Burrough.

Wednesday,  
 Nov. 10th.

**GUNTER v. ASTOR and Others.**

In an action on the case, for enticing away the plaintiff's servants, the measure of damages is not to be ascertained at the actual loss he sustained at the time, but for the injury done him by causing them to leave his employment.

THIS was an action on the case, brought by the plaintiff, a manufacturer of piano-fortes, against the defendants, for having enticed away his workmen from his manufactory, to go into their service. The declaration charged the defendants with conspiring together to entice away his servants. At the trial of the cause before Lord Chief Justice Dallas, at *Guildhall*, at the Sittings after the last Term, it was proved, that one of the defendants had invited the plaintiff's servants to a dinner, where he proposed taking them from the plaintiff at advanced wages, and induced them to sign

an agreement to that effect; that the servants were not hired by the plaintiff for a limited or constant period, but worked by the piece; and that they afterwards were employed by the defendants. It was also proved, that the plaintiff realised about £800 *per annum* by the sale of his instruments. His Lordship was of opinion that the plaintiff had fully made out his case, and left it to the Jury to ascertain what damages he had sustained by the misconduct of the defendants; and they found a verdict for him for £1600.

1819.

GUNTER  
v.  
ASTOR.

Mr. Serjt. *Lens* now moved for a new trial, on the ground that the damages were excessive, as the Jury had indiscriminately given the plaintiff the value of two years profit arising to him from the sale of his instruments. He submitted, that as the men worked by the piece, each of them was justified in leaving the plaintiff when he had completed the work he had in hand; and that, in point of fact, the plaintiff could only be entitled to recover damages for the half-day that his workmen accepted the defendants' invitation. If they had not met on that day, this action could not be supported, as the defendants could not be deemed responsible for employing the plaintiff's servants, when they were empowered to quit his service on the completion of their work in hand. Although the declaration has charged the defendants with conspiring together to entice away the plaintiff's servants, still there was no evidence of such conspiracy, and it could therefore only have been inserted in order to furnish matter of aggravation. In point of fact, therefore, this is merely an action on the case, for enticing away the plaintiff's servants; and in *Skinner v. Gunton* (a), which was an action on the case against three defendants, for a conspiracy in procuring the plaintiff to be maliciously held to bail, the Court held, that the substance of the action was the undue arresting of

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(a) 1 *Sessd.* 228.

1819.  
 GUNTER  
 v.  
 ASTOR.

the plaintiff, and not the conspiracy. So, in *Muriel v. Tracy*(a), which was an action on the case, in the nature of a conspiracy against four, the declaration stated, that the defendants *per conspirationem inter eos habitam*, &c. Lord Holt said, that it being an action on the case, in the nature of a conspiracy, all might be acquitted to one, and he be found guilty, notwithstanding the words *per conspirationem*. Here, therefore, the only injury the plaintiff has sustained, is the loss of the service of his workmen for the space of half a day, when they accepted the defendants' invitation.

Lord Chief Justice DALLAS.—I left it to the Jury to give damages commensurate with the injury the plaintiff had sustained. The defendants clandestinely sent for his workmen, and having caused them to be intoxicated, induced them to sign an agreement to leave him and come to them—by which the plaintiff was nearly, if not absolutely ruined. I am by no means dissatisfied with the verdict the Jury have found, as the conduct of the defendants, in point of fact, amounted to an absolute conspiracy, and I therefore think the Court cannot now be called on to interfere by granting a new trial.

Mr. Justice PARK.—The misconduct of the defendants in this case appears to have been most gross. It has been said that the plaintiff has only sustained damage for the value of the half day's labour of his workmen, when they visited the defendants; but it is not for the Court to ascertain the precise damages he is entitled to, as that was most properly left by my Lord Chief Justice to the Jury.

Mr. Justice BURROUGH was absent.

Mr. Justice RICHARDSON.—This was an action for seducing and enticing away the plaintiff's servants. The mea-

sure of damages he is entitled to receive from the defendants is not necessarily to be confined to those servants he might have in his employ at the time they were so enticed, or for that part of the day on which they absented themselves from his service, but he is entitled to recover damages for the loss he sustained by their leaving him at that critical period. It appears too that the defendants combined to allure them from his service, and I do not think the Court ought now to infer that two years profit is too much for the plaintiff to recover.

1819.

GUNTER  
v.  
ASTON.

Rule refused (a).

(a) See a learned note by Mr. Serjt. Williams, 1 Sand. 230, (4), in which he approved of the judgment of the Court in *Shipner v. Gunter*, although *Sanders* differed from him.

### HEARN v. EDMUNDS.

Wednesday,  
Nov. 10th.

THIS was an action of *assumpsit*, on a policy of insurance on ship and goods, from *Newfoundland to Cork and Waterford*, including all risk in craft to and from the vessel. At the trial of the cause before Lord Chief Justice Dallas, at *Guildhall*, at the Sittings after the last Term, it was proved, that the vessel arrived at the entrance of *Cork* harbour, where the captain took a pilot on board, and that, on the following day, the vessel took ground about two miles up the harbour, owing to the shallowness of water, and continued so until she was floated by the next tide; that she took ground again on the next day, within a mile of the town, from the same cause, and was again floated by the following tide; and that, on the third day, the pilot directed her to be taken to *Pope's* quay, where she was afterwards moored at high water; and that she there took the ground again, on the ebb of the tide, about an hour afterwards, and was thrown on her broadside, by which she was much injured, as well as a cargo of fish

A vessel, with a cargo on board, took the ground on two successive days in going up *Cork* harbour, under the direction of a pilot, and being afterwards moored in the usual course, was thrown on her broadside by the receding of the tide, and received a considerable injury:—Held, that this was not a stranding within the meaning of that term in a policy of insurance.

1819.  
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 HEARN
 v.
 EDMUNDS.

which she had brought from *Newfoundland*. It was also proved, that she was under the direction of the pilot from the time she entered the harbour, until she was moored in the usual place for vessels of that description, and that all vessels of that class were liable to take the ground on going up the harbour. His Lordship was of opinion, that under these circumstances the loss in question could not be considered as a stranding, but left it to the Jury to determine whether it were so or not. They answered in the negative, and a verdict was accordingly entered for the defendant.

Mr. Serjt. *Vaughan* now moved for a rule *nisi*, that this verdict might be set aside, and a new trial granted, and submitted that this was a stranding, and insured against by the policy, and observed, that whether it were a stranding or not, was a question of law, and not of fact, and he relied on the case of *Carruthers v. Sydebotham* (a), as being applicable to the present, where it was decided, that the assured should not be prevented from recovering against the underwriters an average loss on a damage by stranding, occasioned by the neglect of a *Liverpool* pilot, duly appointed by statute, while the ship was under his conduct.

Lord Chief Justice DALLAS.—The Jury put several questions during the progress of the cause, and eventually were of opinion that this was not a stranding. I perfectly concurred with them, and followed the course adopted by Lord *Ellenborough*, in *M^r Dougall v. The Royal Exchange Assurance* (b), where, having defined what he considered to be a stranding, within the meaning of that term in a policy, he put it to the Jury whether it were so or not, and they concurred with his Lordship in thinking it was not a stranding. However, I entertained no doubt at the trial, nor do I now, that this was not a stranding. The event happened in the

(a) 4 *Maul. & Selw.* 77. — (b) 4 *Camp.* 285.

ordinary course of navigation, and the case of *Carruthers v. Sydebotham* is inapplicable to the present.

1819.

HEARN

v.

EDMUNDS.

Mr. Justice PARK.—The case of *Burnett v. Kensington* (a), decided, that, whether there is a stranding or not, is a question for a Jury to determine. If this be considered so, every underwriter to *Cork* must be liable to a loss, as the tide always leaves vessels of a certain class on the ground at low water, in the course of their progress up the harbour. This case is distinguishable from *Carruthers v. Sydebotham*, as there the pilot acted contrary to usage; but here no blame whatever can be imputed to him, as it was proved that all vessels of this description take the ground on going up to the port of *Cork*.

Mr. Justice BURROUGH was absent.

Mr. Justice RICHARDSON.—In *Carruthers v. Sydebotham*, the vessel was improperly moored through the mere misconduct of the pilot, and against the express orders of the captain. Before the improvements were made in the port of *Bristol*, all vessels, on their arrival there, were obliged to take the ground at low water.

Rule refused.

(a) 7 Term Rep. 212.

1819.

Thursday,
Nov. 11th.

SANDS v. GRAHAM.

An affidavit of debt, stating that the defendant was indebted to the plaintiff in the sum of £74, on two bills of exchange, drawn by the plaintiff, and accepted by the defendant, dated on the 11th of February, and for goods sold and delivered to, and work and labour done for the defendant by the plaintiff, without stating that the bills were due and unpaid, is insufficient and defective—and the Court will not allow a supplemental affidavit.

AN affidavit to hold to bail, made by a third person, stated, that the defendant was indebted to the plaintiff in the sum of £74 and upwards, on two bills of exchange, drawn by the plaintiff, and appearing to be accepted by the defendant, bearing date respectively the 11th of February last;—and for goods sold and delivered to, and work and labour done and performed for the defendant by the plaintiff. The deponent then negatived a tender to the plaintiff, as he believed.

Mr. Serjt. *Hullock*, on the first day of this Term, had obtained a rule *nisi*, that the defendant might be discharged out of custody, on entering a common appearance, on the ground that this affidavit was defective in two points: first, that it did not appear that the person making it had any connection with the plaintiff: and secondly, that in order to arrest the acceptor of a bill of exchange, it was necessary to state not only the date of such bill in the affidavit, but that it was due or payable at a day before the defendant was arrested; but here it did not appear that the bills in question were due at that time. He cited the cases of *Jackson v. Yate* (a), and *Holcombe v. Lambkin* (b).—The Court granted the rule on the last objection only.

Mr. Serjt. *Vaughan* now shewed cause, and observed, that as the affidavit contained a distinct allegation for goods sold and delivered, and work and labour, that it was sufficient;—and submitted, that as it could not be considered a nullity, a supplemental affidavit might be filed.

Mr. Serjt. *Hullock*, in support of the rule, insisted, that as the original affidavit was in point of fact a mere nullity, a supplemental one could not be allowed or received by the Court (c),

(a) 2 Maule & Selw. 148.—(b) *Id.* 475.—(c) See 1 Tidd. 6th edit. 196.

for no cause of action could accrue to the plaintiff till the bills became due, for they were only *debita in presenti, solvenda in futuro*, and it did not appear by the affidavit, that they were either due or payable at the time of the arrest; and he relied on the cases of *Holcombe v. Lambkin*, and *Jackson v. Yate*, where Mr. Justice Bayley drew a distinction between an indorsee of a bill or note, and the maker, as the one was only a collateral security, and the other became a debtor presently, though the instrument were payable at a future day. Besides, the case of *Machu v. Fraser* (a) was precisely in point, where it was held, that an affidavit of debt, stating that the defendant was indebted to the plaintiff on a bill of exchange, drawn by the defendant on and accepted by a third person, and on another, drawn by the plaintiff on and accepted by the defendant, without stating the dates of the bills, or that they were due and unpaid, was defective.

1819.
SANDS
v.
GRAHAM.

Lord Chief Justice DALLAS.—It is quite clear, that the original affidavit is defective. It has been said, however, that as it contained a distinct allegation for goods sold by the plaintiff to the defendant, and for work and labour, it was sufficient; but the debt for which these goods were sold could not be demanded or payable until the bills of exchange became due. This was not stated in the affidavit. Although a discretion exists here to grant a supplemental affidavit, contrary to the rule laid down in the Court of *King's Bench*, yet it has never been allowed since I have been in the Court. At all events, this case does not fall within the principles of those in which supplemental affidavits have been allowed; and when the original affidavit is improper or defective, the Court will not interfere to aid the party making it.

The rest of the Court concurring,

Rule absolute.

(a) 2 Marsh. 483.

1819.

Friday,
Nov. 12th.

DOE, on the demise of MACDOUGAL v. ROE.

An affidavit of service of a copy of the declaration and notice in ejectment, on the son of the tenant in possession, and that the tenant acknowledged that he had received the same, is not sufficient, as it must state that such acknowledgment was made before the essoign day.

MR. Serjt. *Hullock* moved for judgment against the casual ejector, on an affidavit of service on the 28th of *October* last, by delivering a copy of the declaration and notice to the son of the tenant in possession, on the premises, and explaining the notice to him; that in a day or two afterwards, the father and son both acknowledged the service, and admitted that they had received the same. He cited the case of *Smith, d. Stourton v. Hurst* (a), where a similar service on the daughter, on the premises, who had delivered it to the wife of the tenant in possession, in his absence, was held sufficient, though it did not appear that such delivery was before the essoign day. But as the affidavit did not state that the acknowledgment was made before the essoign day, the Court ordered it to be amended in this respect; and as the deponent could not swear whether it was made before that day or not:

The learned Serjeant took nothing by his motion (b).

(a) 1 H. Bl. 644. — (b) See *S. P. Roe, d. Hambrook v. Doe*, 14 East. 441.

1819.

HALES, Bart. and Another v. FREEMAN.

Saturday,
Nov. 13th.

THIS was an action of *assumpsit*. The declaration contained the usual counts for money paid, money had and received, and on an account stated. The defendant pleaded the general issue. The cause came on for trial before Lord Chief Justice Dallas, at the Sittings at Westminster after the last Hilary Term, when a verdict was found for the plaintiffs for £114. 15s. subject to the opinion of the Court on the following case.

Dame Mary Lynch, by her last will, bearing date the 31st January, 1786, devised all her real estates to the plaintiffs, and Sir Brooke Bridges and John Conant, both since deceased (upon trust), and bequeathed to the defendant Nancy Freeman an annuity of £100, clear of all deductions, during her life, and declared, that the same should be payable quarterly, on the usual quarter days, and secured upon her real estates. The first payment was directed to be made on the quarter day after her decease. The testatrix died in June, 1808. By indenture of assignment, dated 15th August, 1809, the defendant, in consideration of £400 advanced, assigned to Mary Mays the sum of £58. 16s. part of the said annuity, with a proviso for redemption on payment of the £400.

By an indenture of assignment of several parts, dated 15th April, 1813, to which the defendant, Mary Mays, and one Jane Packharnis, were parties, the defendant and Mary Mays, in consideration of £250 paid to the defendant, and

By the stat. 36 Geo. 3. c. 52. s. 6. the legacy duty must be paid by an executor or administrator, and if not, that it shall become their debt; and that in case they shall pay the legacy without deducting the duty, it shall become a debt to the Crown from both the executor and the legatee; and by the eighth section of that statute, the duty chargeable on legacies given by way of annuity must be paid by four equal payments, the first on or before the completing the first year's annuity, and the three others in like manner successively, before or on completing the payments of the three succeeding years respectively:—Held, that executors under a will, who paid the

legacy duty on an annuity eight years after the death of the testator, may recover the amount from the legatee, in an action for money paid, although such legatee had assigned the annuity three years before,—on the ground, that the payment by the executors was compulsory, and that they stood in the situation of trustees or sureties to the legatee.

1819.

 HALEN
 v.
 FREEMAN.

£400 paid to *Mary Mays*, assigned to *Jane Packharnis* the whole of the said annuity of £100, with a covenant from the defendant that the annuity was free from incumbrances. The plaintiffs omitted to pay the legacy duty of £10 *per cent. per annum*, until the times hereinafter mentioned, and regularly paid the annuity to the defendant in full, without demanding, receiving, or deducting the said duty chargeable thereon, down to the 25th *March*, 1813, and afterwards to *Jane Packharnis*. The plaintiffs, on the 24th of *May*, 1816, paid to the Stamp-office the sum of £57. 7s. 6d. and on the 28th *August*, 1816, the further sum of £57. 7s. 6d., making together the sum of £114. 15s., the full amount of the duty. The first application to the defendant for payment was made on behalf of *Mrs. Packharnis*, on the 21st *May*, 1817.

The plaintiffs afterwards, on the 9th *January*, 1818, applied for payment to the defendant, on their own behalf.

The question for the opinion of the Court was, whether the plaintiffs were entitled to recover? If the Court should be of that opinion, then the verdict was to stand, otherwise a nonsuit was to be entered.

The cause came on for argument this day, when Mr. Serjt. *Lens*, for the plaintiffs, suggested, that the only objection as to their right to recover is, whether the payments of the duties in question can be considered as voluntary payments. They cannot be so deemed, as the duty on legacies is imposed by statute, and must eventually be paid by the legatee. It is true, an executor or administrator is bound to pay it in the first instance, but they stand merely in the character of trustees for the legatee, who is bound to repay them, as such legatee cannot obtain the whole of the legacy, but the representatives of the deceased are entitled to retain the duty

which is paid by them, and to which they are chargeable as the trustees of his real estate. The length of time that has elapsed since the payments in question were made by the plaintiff, is of no consequence, for the defendant is not put in a worse condition by the delay. This case must be governed by the 36 Geo. 3. c. 52. the sixth section (a) of which

1819.
HALES
v.
FREEMAN.

(a) By which it is enacted, " that the duties thereby imposed on receipts for legacies shall be accounted for, answered, and paid, by the person or persons having or taking the burthen of the execution of the will or other testamentary instrument, or the administration of the personal estate of any person deceased, or upon retainer for his, her, or their own benefit, or for the benefit of any other person or persons, of any legacy, or any part of any legacy, or of the residue of any personal estate, or any part of such residue, which he, she, or they shall be entitled so to retain, either in his, her, or their own right, or in the right or for the benefit of any other person or persons; and also upon delivery, payment, or other satisfaction or discharge whatsoever, of any legacy, or any part of any legacy, or of the residue of any personal estate, or any part of such residue, to which any other person or persons shall be entitled; and that in case any person or persons having or taking the burthen of such execution or administration as aforesaid, shall retain for his, her, or their own benefit, or for the benefit of any other person or persons, any legacy, or any part of any legacy, or the residue of any personal estate, or any part of such residue, which such person or persons shall be entitled so to retain, either in his, her, or their own right, or in the right or for the benefit of any other person or persons, and upon which any duty shall be chargeable by virtue of that act, not having first paid such duty, or shall deliver, pay, or otherwise howsoever satisfy or discharge any legacy, or any part of any legacy, or the residue of any personal estate, or any part thereof, to which any other person or persons shall be entitled, and upon which any duty shall be chargeable by virtue of that act, having received or deducted the duty so chargeable, then, and in every of such case, the duty which should be due and payable upon every such legacy, and part of legacy and residue, and part of residue respectively, and which shall not have been duly paid and satisfied to his Majesty, his heirs and successors, according to the provisions of that act, shall be a debt of such person or persons having or taking the burthen of such execution or administration as aforesaid, to his Majesty, his heirs and successors; and that in case any such person or persons, so having or taking the burthen of such execution or administration than as aforesaid, shall deliver, pay, or otherwise howsoever satisfy or discharge any such legacy or residue, or any part of any such legacy or residue, to or for the benefit of any person or persons entitled thereto, without having received or deducted the duty chargeable thereon, (such duty not having been first duly paid to his Majesty, his heirs or successors, according to the provisions therein contained) then, and in every such case, such duty shall be a debt to

1619.

HALES
v.
FREEMAN.

directs an executor or administrator to pay the legacy duty, declaring it to be a debt due from them, and that if they pay over the legacy without deducting the duty, it shall become a debt to his Majesty from both the executor and legatee. And by the eighth section of that statute(a), the duty chargeable on annuity legacies must be paid by four equal quarterly instalments in each year, for the first four years of the payment of such annuity. The 45 Geo. 3. c. 28. s. 5.(b), extends the duty to trustees of real estates, when an annuity shall be chargeable thereon. The only question, therefore, turns on the former statute. The duty can relate to the defendant alone, and not to her assignee; for it was originally

his Majesty, his heirs and successors, both of the person or persons who shall make such delivery, payment, satisfaction, or discharge, and of the person or persons to whom the same shall be made."

(a) By which it is enacted, "that the value of any legacy given by way of annuity, whether payable annually or otherwise, for any life or lives, or for years determinable on any life or lives, or for years or other period of time, should be calculated, and the duty chargeable thereon should be charged, according to the tables in the schedule thereunto annexed: and the duty chargeable on such annuity should be paid by four equal payments, the first of which payments of duty should be made before or on completing the payment of the first year's annuity, and the three others of such payments of duty should be made in like manner successively, before or on completing the respective payments of the three succeeding years' annuity respectively; and that the value of any such annuity, if determinable upon any contingency besides the death of any person or persons, should be calculated without regard to such contingency."

(b) By which it is enacted, "that the duties thereby granted upon legacies, or charged upon or made payable out of any real estate, or out of any monies to arise by the sale of any real estate, or upon residues, or parts or shares of residues of any such monies, should be accounted for, answered, and paid by the trustees to whom the real estate should be devised, out of which the legacy or share of any money arising out of the sale or mortgage, or other disposition of such real estate, should be to be paid or satisfied, or if there should be no trustees, then by the person or persons entitled to such real estate, subject to any such legacy, or by the person or persons empowered or required to pay or satisfy any such legacy; and that the said duties should be retained by the person paying or satisfying any such legacy or share of money, in like manner, and according to such rules and regulations, and under and subject to such penalties, as far as the same could be made applicable, as were contained in the 36 Geo. 3. c. 52."

a debt of the former, and the demand subsisted both against her and Mrs. *Packharnis*, until *May*, 1816. It is quite clear that an executor is bound to pay in the first instance, on the account of the annuitant, to whose use the money in question has been paid by the plaintiffs, and when such payments were made by them, they were merely liable to Government as standing in the situation of sureties to such annuitant, to be indemnified by the annuitant on account of such duty. Still, however, it was insisted for the defendant at the trial, that the payment of those sums by the plaintiffs was voluntary, and the case of *Denby v. Moore* (a) was relied on as applicable to the present; but that case was determined on the express provisions contained in the Property Tax Act (b), and to avoid collusions between landlords and tenants, by which the former might raise their rents, and Government receive less duty. So, *Brisbane v. Dacres* (c) was relied on; but there the party clearly acted under a mistake as to the law; for until the case of *Montagu v. Janverin* (d), payments for freight were made to admirals, as was done by the plaintiff in *Brisbane v. Dacres*. That case, however, is wholly beside the present; for here there is no mistake either of law or fact, as the legatee only, is actually and eventually liable to Government for the payment of the legacy duty. Neither can the rule, that "*ignorantia juris non excusat*," be applicable to the present question; for here the defendant was solely responsible. The time that elapsed before the payments were made by the plaintiff, was for her benefit alone, and they are therefore entitled to recover.

1819.
HALES
v.
FREEMAN.

Mr. Serjt. *Taddy*, *contra*, submitted, that the sums paid by the plaintiffs to the Stamp-office could not be recovered back, as it must appear, first, that they were paid on account

(a) 1 Barn. & Ald. 123. — (b) 46 Geo. 3. c. 65. — (c) 5 Tenn. 143.
(d) 3 Tass. 447.

1819.
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 HALE  
 v.  
 FREEMAN.

of the defendant, or secondly, by her authority, express or implied, neither of which facts existed in the present case. By the eighth section of the 36 Geo. 3. c. 52. the duty of an executor is clearly pointed out, and the legacy duty must be paid by him by quarterly payments, within four years after he has proved the will, and at the expiration of that period, his right to detain or deduct such duty is at an end; and by the sixth section, the reason that he should do so is manifest, viz. to accelerate the executor's accounts, and the payment of the duty to Government. It is true, that the latter part of that section makes both the executor and legatee debtors to the Crown, but the annuitant can only be called on to pay the duty during the first four years, and if the executor do not detain or deduct it during that period, he cannot do so afterwards. [Lord Chief Justice *Dallas*.—This appears to me to be a compulsory and not a voluntary payment by the executor, for he is primarily liable to the Crown.] The intention of the Legislature was, that an executor should not be allowed more than four years to pay the duty of an annuity legacy. [Mr. Justice *Burrough*.—The object of the eighth section of the statute was in ease of the parties, so that they might not be called on to pay the whole amount of the duty at once, but to be allowed four years for that purpose.] But an executor has no right to retain the duty under that clause, after the four years have expired. Although it may be deemed a debt to Government both from him and the legatee, still it does not create a debt from the legatee to the executor. The latter, therefore, makes the payment expressly on his own account, to avoid process being sued out against him by the Court of Exchequer. How, therefore, can such payment be said to be a payment on behalf of a legatee? Besides, in this case the annuity has been assigned. The defendant, therefore, had parted with all the benefit she could derive from the annuity before either of the payments in question were made. It may therefore be inferred, that those payments were made by the implied authority of her assignee, who alone was in the cu-

joyment of the annuity. The case of *Andrew v. Hancock* (a) bears a near resemblance to the present, where it was held, that a tenant having paid land tax six successive years, without claiming a deduction from his landlord for such payments when he paid his rent, could not deduct them after the payment of the rent within the current year. [Mr. Justice Burrough.—The land tax is an annual rent, and by the case of *Rex v. Mitcham* (b), was to be imposed and levied on the occupier, and not on the landlord.] But such tax must ultimately fall on the landlord, and there it was held, that the tenant having paid it, was bound to deduct it from the rent of the current year; but in this case there is no authority, express or implied, from the defendant to the plaintiffs, for the payment of those sums; for such payment, as well as the deduction, should have been claimed within four years, still the plaintiffs now contend, that they are entitled to retain it from the defendant, although eight years have elapsed before any demand was made on her for such payments. The plaintiffs, therefore, should have made the payments for the duty, and claimed the deduction from the defendant within the first four years, as the tenant should have deducted the land tax, in *Andrew v. Hancock*, within the current year, when his rent became due; and not having done so, the right of retainer is lost. No privity, therefore, can exist between the plaintiffs, as executors, and the defendant, as legatee, as the former should have claimed the deduction during the first four years, and as they did not do so, they still remained liable to process at the suit of the Crown. The defendant too was then liable, and if she had paid the duties, she could not have recovered them back from the plaintiffs. Neither, therefore, can they recover from her. It has been said, that an executor stands in the situation of a surety, and must therefore be indemnified.

1819.  
HALES  
v.  
FREEMAN.

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(a) *Ante*, vol. iii. 278. S. C. 1 Brod. & Bing. 37.—(b) *Cald.* 276.

1819.  
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 HALE'S
 v.
 FREEMAN.

fied by a legatee as his principal; but it is doubtful whether money paid by a surety for the use of his principal, can be recovered at law, if both are equally liable to pay it; but a liability can now be supported on equitable grounds alone. But here there is no connection whatever between the plaintiffs and defendant; and unless the former be entitled to recover by the statute, the defendant cannot be liable to pay the sums now claimed by them, for the duties in question.

Mr. Serjt. *Lens*, in reply.—The object of the Legislature in passing the statute 36 *Geo. 3.* was not to make an executor or administrator personally or ultimately liable to the duties imposed thereby, but merely directed within what time such duties might be paid, in case of the legatee. The case of *Andrew v. Hancock*, therefore, is beside the present question. It is quite clear the payments made by the plaintiffs were made on account of the defendant, and although their power of retaining was gone, more than four years having elapsed, still their right to recover them, as money paid to her use, still continues, as they remained liable to the Exchequer process, until the payments were actually made. Although no express authority for making such payments arises from law, still they were compulsory on the plaintiffs, as the defendant alone was ultimately liable, although they were bound to make them in the first instance. The law, however, raises an obligation, which if not express, is clearly implied. An executor would not be justified in paying all the duties in the first instance, for it is his duty to retain them during four years, and pay them proportionally at stated periods; and even if he pay in advance, he can only retain according to the provisions of the statute, the object of which was, not to distress the legatee by levying all at once, but allowing four years for that purpose. An executor is not beneficially interested. No limitation is given by the statute as to the time the executor may retain, but it merely provides

that the duties shall be paid to Government within four years. As to the position, that the liability of a surety for a payment made on account of his principal, can be supported on equitable principles alone, it cannot be applicable to this case; for an executor is merely in the situation of a surety to Government for the payment of the duties, but the legatee is the principal and sole person who derives any benefit from the legacy, and is alone ultimately liable for the payment of those duties. Although the defendant had assigned the annuity before the payments in question were made, it is altogether immaterial, for she originally received the whole of the proceeds of the legacy, when the duties to Government should have been paid. This case, therefore, is wholly different from that of *Andrew v. Hancock*, as here both parties are debtors, and the payments by the plaintiffs, as executors, were compulsory in the first instance; but such payments were made for the use of the defendant, as legatee, who is the only person beneficially interested under the legacy, and from whom they have now a right to retain the sums in question.

1819.
HALES
v.
FREEMAN.

Lord Chief Justice DALLAS.—This case depends on the construction of various clauses in two acts of Parliament, namely, the 36 Geo. 3. c. 52. and the 45 Geo. 3. c. 28. The former of these relates to duties payable on legacies and shares from personal estates only, and by the sixth section of that statute, the duties were directed to be paid by executors or administrators, on retainer, on the payment of legacies, and finally provided, that if the duties were not duly paid before legacies were retained by executors, or discharged, they having deducted it, the amount was to be a debt from them to his Majesty, and that if they paid legacies without deducting the duties, it should be a debt from both the executor and legatee. The legacy in question was an annuity charged on a real estate, and the fifth section of the 45 Geo. 3. c. 28. subjects property of that description to the provisions

1819.

HALES

v.

FREEMAN.

contained in the 36 *Geo. 3. c. 52. s. 6.* The eighth section of the latter statute directs, that the value of any legacy given by way of annuity, and the duty chargeable thereon, shall be payable by instalments at certain periods therein stipulated. Here, more than four years had elapsed, and payments had been made by the plaintiffs, as executors, to the defendant, as legatee, of the annuity in question, without the deduction of the duties by the plaintiffs, as such executors. The defendant is therefore now called on by the plaintiffs to repay the amount of those duties which they had not deducted according to the provisions of the latter section, they having paid the whole amount of the legacy to the defendant. It must be considered, that the defendant is the only person beneficially interested. The present action is founded on the provision contained in the sixth section of the 36 *Geo. 3.* namely, that if executors pay legacies without deducting the duties at the time, such duties shall be considered as a debt from both parties. Although more than four years may have elapsed, the parties are still liable, and it is expressed, that the duties shall notwithstanding be a debt to his Majesty, both from the executor and the legatee. It must be deemed a debt from the former, to make him liable in the first instance, but notwithstanding this, it leaves the legatee in the same situation; for the debt remains due from such person, in case the deductions are not made by the executor. It has been contended by my Brother *Taddy*, that the instalments should have been paid within four years. If they had been regularly made, they must have been so. But the statute 36 *Geo. 3.* provides two things; first, that if the duty be not deducted at the time of the payment of the annuity, both the executor and legatee are liable; and, that if the instalments be not regularly made, the legatee remains liable as he did in the first instance. There is a continuing liability in the legatee, and he remains equally liable as if the payments were made within the four years. It is unnecessary to travel back to the previous cases that have been cited, as

bearing on the present question, for it has been expressly provided for by the statute. The defendant is the only person beneficially interested. This is not like the cases of voluntary payments, or payments made in ignorance of the law, or by mistake, or under doubtful circumstances. It was compulsory on the plaintiffs, as executors, to pay the duties for the person beneficially interested. They certainly might have deducted them in the first instance; but if a legacy be paid without such deduction, the plaintiffs and defendant are both liable, the one as executor, the other as legatee. The duties were to be deducted from the funds of the defendant. They were paid by the plaintiffs on her account, and I therefore think they are entitled to recover.

1819.

 HALE
 v.
 FREEMAN.

Mr. Justice PARK.—On the first view of this case, I thought it an apparent hardship that the defendant should be called on to repay this money, after so long a time had elapsed, and after the annuity had been assigned; but I now think that it would be a greater hardship if the plaintiffs were not entitled to recover; as the sums in question were paid by them on account of the duties on the defendant's legacy. The plaintiffs themselves had no beneficial interest whatever in the annuity. No reflection will be cast on the previous cases, as it is not necessary to touch on or question them for the purpose of this decision. In *Denby v. Moore*, the Court of *King's Bench* held, that the deduction for property tax must be made by the tenant out of the *first* payment of rent to his landlord, and that if the tenant were to lie by without making such a deduction at the time, he could not afterwards do so. The decision in that case was founded expressly on the Property Tax Act. In the case of *Andrew v. Hancock*, it was held, that a similar construction was applicable to the Land Tax and Paving Acts; but this Court there grounded their judgment on the words of those latter statutes. But this case is wholly distinguishable and disconnected with them, as here the plaintiffs were required to make the deductions by statute. This was not a voluntary

1819.
 HALE
 v.
 FREEMAN.

payment made by them, for they continued liable to the Crown until these duties were paid. Neither can this be considered as a payment by mistake, and falling within the cases of *Brisbane v. Dacres*, and *Bilbie v. Lumley* (a), for it was in fact a compulsory payment. These latter cases merely establish, that if a party pay money with full knowledge, or the means of knowledge, of the facts, such money cannot be recovered back; but here the plaintiffs paid the duty for the defendant as legatee. The parties, therefore, might be considered to stand in the relative situations of principal and surety. The plaintiffs, as executors, were in the nature of sureties, and the defendant, as legatee, was the principal, and the only person beneficially interested in the payment of the annuity in question.

Mr. Justice BURROUGH.—The substantive cause of action in this case is founded on the plaintiff's right to recover a sum of money paid by them for duties on a legacy. In order to secure the payment of these duties, various provisions are made by two different statutes, but the legatee is the person who must ultimately bear the burthen of these duties. Their being made payable by instalments, and within four years from the time in which the annuity was granted, must be construed to be in ease of the party who is eventually obliged to pay them. Here, the defendant, as legatee, had the full benefit of the annuity for nearly five years, and during the whole of that time received more than she ought from the plaintiffs, as executors. The payments in question were not voluntary on the part of the plaintiffs, as they might be enforced to make them by Government, in their character of executors, and they might in fact be sued for that purpose. It is a clear principle, that where a person is compellable by law to pay money, he may do so without force, or being sued for that purpose. If the plaintiffs had been sued for and paid the duties, could they not have recovered

(a) 2 East. 469.

them back from the defendant? The payments were made by them in their character of executors. They derived no beneficial interest themselves; they might be considered as trustees for the benefit of the defendant, and are therefore not to bear the burthen, but the legatee who had the benefit of the annuity. I even think, that, under the circumstances, an action for money had and received might have been maintained, but that it is now unnecessary to consider. The case of *Andrew v. Hancock* is wholly distinguishable from the present, as the land-tax is chargeable on the tenant in the occupation of the land, and he must pay it, unless there be a special agreement between him and his landlord. Indeed, it is so much considered a tax on the tenant, that the name of the landlord need not appear in the rate, unless it be for the purpose of enabling him to vote at elections for a Member of Parliament. I therefore concur with my Lord Chief Justice, and my Brother *Park*, and think the plaintiffs are entitled to recover.

1819.
HALES
v.
FREEMAN.

Mr. Justice RICHARDSON.—This case is clearly distinguishable from those of *Denby v. Moore*, and *Andrew v. Hancock*; for here, if a legacy be paid without deducting the duties, such duties are a debt due to the Crown from both the executor and the annuitant. In *Denby v. Moore*, the tenant had voluntarily paid the property-tax for a number of years, without claiming any deduction from his landlord; and it was held, that such deduction should have been claimed out of the next rent, as it became due and payable to the landlord within the current year. He having, therefore, made full payments for rent, the Court considered them as voluntary. So, in *Andrew v. Hancock*, the tenant paid the landlord more than he ought; and in both these cases, the taxes had been paid by the tenants before they paid the rent to their landlords. It has been contended by my Brother *Taddy*, that the sums in question cannot be recovered back by the plaintiffs, as executors or trustees, against the defendant as legatee; as it was

1812.
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 HALES  
 v.  
 FREEMAN.

a debt due from both parties ; but if one party pay the whole, an action will lie, as in the case of a surety to recover contribution, which is maintainable if both are legally liable. Here, however, the plaintiffs are entitled to recover the whole of the sums they have paid, as the defendant was the only person beneficially interested, and who, in fact, received the sole benefit from the annuity. The plaintiffs might be considered as trustees, and in the nature of sureties for the payment of the duties in question to Government, and I therefore think that they are entitled to recover.

Judgment for the Plaintiffs.

Wednesday,  
 Nov. 17th.

WALTERS v. REES and Others.

If a plaintiff, while attending the execution of a writ of enquiry on an action brought by him in this Court against the defendants who had suffered judgment by default, be arrested by a *quominus* at the suit of a third person ;—the under-sheriff before whom such enquiry is executed cannot discharge him, but the Court will do so on motion.

THE plaintiff brought an action of trespass against the defendants in this Court, for taking away his goods ; and judgment by default having been signed against them, a notice of executing a writ of enquiry before the Sheriff of *Monmouthshire* was given them in *April* last, and was accordingly executed on the 17th of that month, before the under-sheriff of that county ; on which occasion the plaintiff attended with his attorney and witnesses, when the Jury awarded him £500 damages. After the enquiry was executed, and the Jury had retired to consider their verdict, the plaintiff was arrested in the same house by two officers of the Sheriff of *Monmouth*, on a warrant granted by him on a writ of *Quominus* out of the Court of *Exchequer*, at the suit of one *Mudge* for £24. The plaintiff's attorney then informed the officers that he was privileged from arrest, as he was attending the execution of the enquiry, but they refused to discharge him ; on which application was made to the under-sheriff to order the plaintiff to be discharged, which he refused to

do, although he knew that he was attending the execution of the enquiry. Under these circumstances,

1819.

WALTERS

v.  
RSM.

Mr. Serjt. *Vaughan*, in the last Term, obtained a rule nisi, that the plaintiff might be discharged out of the custody of the Sheriff of *Monmouth*, as to the action at the suit of *Mudge*, and that the attorney who caused the writ to be issued in that suit, and the under-sheriff of *Monmouth*, might pay the plaintiff the costs occasioned by his arrest and detainer.

Mr. Serjt. *Onslow* and Mr. Serjt. *Laves* now shewed cause on affidavits, which stated that the plaintiff had made a similar application to the Court of *Exchequer*, which had been refused in the first instance, and they insisted, *first*, that the plaintiff was not privileged from arrest because he attended the execution of the writ of enquiry, which was not compulsory on him, as if he had been a witness; and, *secondly*, if he were privileged, that the application could only have been made to the Court of *Exchequer*, on whose process he had been arrested, and not to this Court, who had no jurisdiction to order his discharge.

Mr. Serjt. *Vaughan*, in support of the rule, insisted, that the under-sheriff of *Monmouth* had been guilty of a breach of duty in not having discharged the plaintiff in the first instance, as he was not only presiding at the execution of the writ of enquiry, but directed him to be detained in custody under a warrant issued by the sheriff of that county.

Lord Chief Justice DALLAS.—In cases of this description, the Court alone are privileged to discharge a person arrested, and not the party who makes or orders the arrest. It does not appear that the under-sheriff was empowered to discharge the plaintiff in the present instance; still, the Court have a power to do so; and I think the under-sheriff exercised a proper discretion, if not, the plaintiff may proceed against him by attachment.

1819.

WALTERS  
v.  
REES.

Mr. Justice PARK.—Neither an arbitrator nor a commissioner of bankrupt is empowered to discharge a person arrested during his attendance before them; much less an under-sheriff, who in this case merely acted as an officer to the sheriff. There is no reason, therefore, to attach any blame to him; and in *Walker v. Webb* (a), it was held that a defendant, arrested by *quo minus* while protected by the privilege of this Court, as a suitor here, may be discharged either by this Court or the Court of *Exchequer*.

Mr. Justice BURROUGH and Mr. Justice RICHARDSON concurring, the rule for the plaintiff's discharge was made Absolute (b).

(a) 3 *Anst.* 941.

(b) See *Cameron v. Lightfoot*, 2 *Sir W. Bl.* 1190. and *Tarleton v. Fisher*, 2 *Doug.* 671, where it was held that a sheriff could not take notice of the privilege of attorneys or other officers, on account of the supposed necessity of their attendance, in order to transact the business of the Courts, nor was he bound to take notice of the privilege of a witness.

Saturday,  
Nov. 20th.

GUICHARD and Another v. MORGAN and Another.

The defendants, as brokers for B. and Co., effected two purchases of seed, both of which were paid for by B. & Co. and left in the defendants' warehouses, for the purposes of re-sale; the first was made on account of B. & Co., and the other for the plaintiffs, resident abroad,

and by their express order; but the invoices of both were made out in the name of B. & Co., who did not inform the defendant, that the latter purchase was not made on their account:—Held, that the defendants having made advances to B. & Co. could not retain possession of the seed against the plaintiffs, on the ground that a factor has no authority to pledge the goods of his principal.

THIS was an action of trover for 67 sacks of clover seed. At the trial of the cause before Lord Chief Justice Dallas, at *Guildhall*, at the Sittings after the last Term, it appeared in evidence that the plaintiffs were merchants, residing at *Antwerp*, and that the defendants, in *July* last, having been previously acquainted with the firm of *Burmester and Vidal*, who carried on business as general merchants in *London*, sold them on their (the defendants) own account, 12 tons of clover seed, which were paid for in cash, and left in the defendants' warehouses, for the purpose of being re-sold by them, as factors for *Burmester and Vidal*, when a favourable oppor-

tunity should occur. That in the following month, the defendants, as factors, purchased the seed, to recover which this action was brought, by order of *Burmester* and *Vidal*, and on their account, which *Burmester* and *Vidal* paid for in cash, and which was also left in the defendants' warehouses for the purpose of re-sale; that in both instances, invoices were made out and delivered to *Burmester* and *Vidal*, in their own names, and that in the latter transaction, the defendants handed over to *Burmester* and *Vidal* the bought-note which they received from Messrs. *Ellis*, the sellers, according to the practice of the trade between factor and principal. That in *November* last, all the seed still remaining in the possession of the defendants, in consequence of the unfavourable state of the markets, *Burmester* and *Vidal* applied to them for an advance of £2000 on the security of the seed in question, and they accordingly drew bills on the defendants to that amount, and which they accepted; that a few days before these acceptances became due, *Burmester* and *Vidal* applied to the defendants for further time, to meet the acceptances, and for which *Burmester* and *Vidal* had agreed to provide cash, and that a new arrangement was entered into between the parties. It was further proved by *Vidal*, that the seed in question was purchased by order of the plaintiffs, and on their account, and that one of the plaintiffs was in *London* at the time the purchase was made; that the invoice was made out to *Burmester* and *Vidal*, as principals, and, together with the bought-note, received by the defendants from the sellers, was handed to the plaintiffs, who knew the seed was left with the defendants, and that it was paid for by *Burmester* and *Vidal*'s draft, and that the seed was held by them on account of the plaintiffs, when the advances were made by the defendants to them.—For the defendants, it was contended, that *Burmester* and *Vidal* were only known to them as principals or general merchants; but the plaintiffs insisted, that, as *Burmester* and *Vidal* had purchased the seed for them as factors, they had no authority to pledge. His Lordship left it to the jury to consider, whether the plaintiffs were entitled to recover either in fact or by law,

1810.  
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 GUICHARD
 v.
 MORGAN.

1889.
GUICHARD
v.
MORGAN

and said, that they were to judge whether this case was distinguishable from the general rule, that a person standing in the situation of factor, has no authority to pledge the goods of his principal. The Jury returned a verdict for the defendants.

Mr. Serjt. *Lens*, on a former day in this Term, obtained a rule *nisi*, that this verdict might be set aside, and a new trial granted, on the ground that no property in the seed passed to the defendants by the deposit made by *Burmester* and *Vidal* to them; that the former were not authorised to make advances to the latter, as the plaintiffs had not empowered them to raise money on their account, or to act as principals in the transaction.

Mr. Serjt. *Vaughan* now shewed cause. If this came within the general class of cases of factors pledging the goods of their principals, it is quite clear that it would be an excess of authority; for in *Paterson v. Tush* (a), it was decided, that though a factor has power to sell, and thereby bind his principal, yet that he could not affect or bind the property of the goods, by pledging them as a security for his own debt; but this case is mainly distinguishable, for *Burmester* and *Vidal* dealt in the market on their own account as principals as well as brokers; and if the plaintiffs allowed them to hold themselves out as principals, they discharged the liability of the defendants. The purchase in question was made in the names of *Burmester* and *Vidal*, and the invoice was made out accordingly, and the seed was expressly delivered to the defendants to be re-sold on an advance of the market, together with other seed, which *Burmester* and *Vidal* had before purchased, and deposited with them, on their own account. The plaintiffs never gave the least intimation to the defendants that they were principals, but permitted *Burmester*

(a) 2 *Strange*, 1178.

and *Vidal* to deal with them as such. This therefore comes within the principle laid down by Lord *Ellenborough* in *Martini v. Coles* (a), where he observed, that, "where indeed a factor, by the assent of his principal, exhibits himself to the world as owner, and by that means obtains credit as owner, the principal will be liable who furnished the means." [Lord Chief Justice *Dallas*.—Although a factor may have the *prima facie* possession of goods, still he has no right to pledge them, if in fact they are the property of another.] In *M'Combie v. Davies* (b), the party pledging was an accredited agent, but here the seed was never out of the defendants' possession, nor did they know that *Burmester* and *Vidal* were acting as factors; and more particularly so, as the invoice was made out in their names, although one of the plaintiffs was then in this country; or at all events they might consider them as principals, acting with the consent of the plaintiffs. In *Pickering v. Busk* (c), Lord *Ellenborough* held, that "it could not fairly be questioned in that case, but that the broker had an implied authority to sell; that strangers could only look to the acts of the parties, and to the external *indicia* of property, and not to the private communications which might pass between a principal and his broker; and that if a person authorised another to assume the apparent right of disposing of property in the ordinary course of trade, it must be presumed that the apparent was the real authority." Here, therefore, the defendants had a right to consider *Burmester* and *Vidal* as the principals, as the *indicia* of the property was in them, and consequently that takes this case out of the rules of the general modes of dealing, as between principals and factors.

1819.

GUICHARD
 v.
MORGAN.

Mr. Serjt. *Lens*, in support of the rule, was stopped by the Court.

(a) 1 *Mauls & Selw.* 147.—(b) 6 *East* 538.—(c) 15 *East* 43.

1819.

GUICHARD
v.
MORGAN.

Lord Chief Justice DALLAS.—The facts of this case clearly shew, that the property in the seed did not belong to the parties by whom it was pledged, but that they stood in the situation of factors for the plaintiffs; and consequently they could have no authority to pledge. The defendants sold seed to *Burmester* and *Vidal* on their own account, and were also employed by them to purchase the seed in question for the plaintiffs, as their factors, they having before made them advances for this particular purpose. The only question then is, whether *Burmester* and *Vidal* were authorised by the plaintiffs to pledge; or, in other words, whether the acts they have done amount to a pledging or not. It appears to me, that, in point of principle, this case comes round to the general one, of a factor's pledging the goods of his principal; but it has been said, that the plaintiffs consented that *Burmester* and *Vidal* should appear as the real owners of the seed; but that does not seem to be so, under the circumstances of this case. When a factor is employed to purchase or sell, the contract is usually made out in his own name; although, allowing him to retain possession of the property may be *prima facie* evidence of ownership, still, if the actual right of property be in another, he can have no power to pledge. The case of *Martini v. Coles* seems to me to be decisive of the present question:—There, goods were consigned from abroad to a factor, to be sold on account of the consignor, and a bill of lading was sent to deliver the goods to the factor, or his assigns; the factor afterwards indorsed and delivered the bill of lading, together with the goods, to the defendants, as brokers, with instructions to do the needful; and the defendants made advances to him on the credit of those and other goods, without knowing that he was not the owner of them; and it was held that the defendants could not retain the goods against the consignor, until payment of the debt due to them from the factor on account of these advances. There, the

factor was as much the ostensible owner of the goods as *Burmester* and *Vidal* are in this case. In point of principle, therefore, I am of opinion, that this is in fact the common case of a factor pledging the goods of his principal which have come to his hands ; and I need only to add, that the verdict of the Jury was against my opinion.

1819.

 GUICHARD
 v.
 MORGAN.

Mr. Justice PARK.—I entirely concur with my Lord Chief Justice. My Brother *Vaughan* has endeavoured to distinguish this from the preceding cases, by which it has been uniformly decided that a factor has no authority to pledge the goods of his principal ; but it appears to me, that there is no ground for any such distinction. In fact, the plaintiffs had paid *Burmester* and *Vidal* for the seed before the sale was effected, and it was in reality purchased by their money, although paid for by the check of *Burmester* and *Vidal*. The facts of the case of *Martini v. Coles* are nearly similar to the present ; the principle, therefore, appears to be, that whether a party is ignorant or not as to whom the goods may really belong, still, if they are not the property of the person pledging, the principal cannot be bound by his acts. The sale, from the circumstances disclosed in evidence in this case, was entirely different from that in *Pickering v. Busk* ; and I therefore am of opinion that there should be a new trial.

Mr. Justice BURROUGH.—In point of fact, *Burmester* and *Vidal* were merely the factors of the plaintiffs, and there was nothing in their conduct to shew that they intended them to act as principals in purchasing the seed in question.

Mr. Justice RICHARDSON.—I am also of opinion, that this case falls within the rule that a factor cannot pledge the goods of his principal. This was fully established in the case of *Martini v. Coles*, which applied to goods consigned

1819.
 GUICHARD
 v.
 MORGAN.

from abroad to a factor, to be sold on account of the consignor, as well as to goods purchased in this country by a factor on account of his principal. I therefore concur with the Court in thinking, that this case falls within the general principle, and, consequently, that the rule for a new trial must be made

Absolute.

Saturday,
 Nov. 30th.

SANDERSON and Another v. SYMONS.

A vessel was insured from *Liverpool to Africa*, and during her stay there, and back, with liberty to sell, barter, exchange, load, and re-load goods. After the execution of the policy, the assured inserted the words "*and trade*" in the risk, without the consent of the defendant, (an underwriter), although others had assented thereto. Held, an immaterial alteration, as the ship had liberty to trade without the introduction of those words.

THIS was an action of *assumpsit*, brought by the plaintiffs against the defendant, another underwriter to the same policy as in the case of *Sanderson v. M'Cullom (a)*. The declaration here contained two counts, the first stating the policy in its altered form, the words "*and trade*" being introduced; and the second omitted those words, and stated the policy to be in the same terms as it was originally subscribed. At the trial of the former cause, on a verdict having been found for the plaintiffs, a verdict was taken for them by consent in this action, and the only distinction was, that here the evidence of the defendant's agent was to be taken, which was as follows:—that the policy was shewn to him on the 11th of *February* by one of the plaintiffs, who stated that the ship was to go to *Bonny*, in *Africa*, to load with palm oil, and back to *Liverpool*; that a conversation passed respecting her trade, when the plaintiff said, "she is going to one port to load palm oil"—but that the broker saw no letter of order; that on the following day, he saw the plaintiff talking with *M'Cullom* and another underwriter on the policy, when *M'Cullom* asked him, whether he intended to give the ship liberty to trade; that he then saw the policy, and believed their initials had been put to it; but

(a) *Ante*, page 5.

that the broker declined putting his initials when requested to do so, when the other underwriter told the plaintiff he had deceived him, and immediately ran his finger over his initials, the ink being then wet; and that *M'Cullom* endeavoured to get the policy to do the same, but that the plaintiff took it away,—when the defendant's broker said, that he dissented to the introduction of the word "*trade*," as he never underwrote trading policies to *Africa*; he therefore refused to subscribe his initials, and proposed to return the premium to the plaintiffs, which they refused to take, and which he had since paid into Court.

1819.
SANDERSON
v.
SYMONS

Mr. Serjt. *Lens*, on a former day in this Term, having obtained a rule *nisi*, that this verdict might be set aside and a nonsuit entered, on the same objection to the interlineation of the words, "*and trade*" in the policy, as in *Sanderson v. M'Cullom*, and more particularly so, as here the defendant's broker had expressly dissented from their being introduced, and had not signed his initials to the policy in its altered state :

Mr. Serjt. *Vaughan* now shewed cause. The only objection to the plaintiffs being entitled to retain their verdict is, that the words "*and trade*," were introduced into the policy after it was subscribed by the defendant's broker, and that it had the effect of vitiating the policy. But the risk is not thereby altered, and the interlineation of these words are mere surplusage; for by the words *sell, barter, and exchange goods*, in the body of the policy as it originally stood, the vessel had a clear right to trade on the coast of *Africa*. Policies of insurance are wholly different to other instruments under seal, as they apply to the respective interests of numerous and unconnected parties; and by the 35 Geo. 3. c. 63. s. 13 (a), altera-

(a) By which it is provided, that nothing in that act should extend to prohibit the making of any alteration which might lawfully be made in

1819.

ANDERSON
v.
SYMONS.

tions in policies are authorised and legalised ; and unless the risk be enlarged, such instruments do not require a fresh stamp. In *French v. Patton (a)*, Lord *Ellenborough* said, that " the plaintiff's own act had made, as far as he could make, the policy speak a different language from what he then insisted that it did, and that he must take the consequences ;" but here the alteration did not vary the terms of the original contract, and therefore could not vitiate the policy ; besides, several of the underwriters had consented to the interlineation of those identical words. If a liberty to take a supercargo had been inserted, it would not vitiate the policy ; and the Jury by their verdict found, that the risk was not altered by the introduction of the words " *and trade* ;" and therefore that the original contract must continue in force. In *Langhorn v. Cologan (b)*, Sir *James Mansfield* said, " the instrument now is different from what it is stated in the only count on which the plaintiff could have recovered at the trial. The alteration is a very material one. When once a declaration of interest is made, the policy attaches not on any goods the plaintiff might put on board, but on those comprehended in that declaration. The instrument, therefore, as to those who do not assent to that declaration is gone." But there a specific subject of insurance was added. So in *Fairlie v. Christie (c)*, the time of sailing was enlarged, which was a material alteration ; but the interlineation of the words in this case were altogether unnecessary and superfluous, and therefore do not vitiate the policy.

the terms or conditions of any policy of insurance, duly stamped, after the same should have been underwritten, or to require any additional stamp duty by reason of such alteration ; so that such alteration be made before notice of the determination of the risk originally insured, &c. ; and so that the thing insured should remain the property of the same person or persons ; and so that such alteration should not prolong the term insured beyond the period allowed by that act ; and so that no additional or further sum should be insured by reason or means of such alteration.

(a) 9 East 356. — (b) 4 Taunt. 333. — (c) *Ante*, vol. i. 114.

Mr. Serjt. *Lens*, in support of the rule.—Here the defendant's agent expressly disputed to put his initials to the policy after the interlineation was made, on the ground that the ship was not originally intended to trade. The alteration, therefore, is material, and avoids the policy as against the defendant. Though the Jury thought it immaterial, still the broker considered it otherwise; at all events, the plaintiffs cannot recover on either of the counts in this declaration, as the defendant did not assent to the alteration, as stated in the first, and the contract given in evidence cannot support the second, unless such contract can be used as if those words had not been introduced. The statute 35 Geo. 3. is not applicable to this case, as it merely authorises an alteration to be made in a policy with the consent of both parties. In *Langhorn v. Cologan*, where the policy was executed in the common printed form, and the subject-matter of the insurance afterwards inserted, it was held to vitiate the instrument, as against those underwriters who had not signed it after the insertion; so here, this policy cannot be in force against the defendant, who expressly refused to subscribe his assent to the interlineation. The word *trade*, therefore, is the foundation of the new contract, and varies the legal operation of the policy as it originally stood.

1819.

 SANDERSON
 v.
 SYMONS.

Lord Chief Justice DALLAS.—The justice of this case is with the plaintiffs. Whatever the effect of the alteration might be, still it appears most singular that the parties should have intended that the ship should merely go to *Africa*, and return to *Liverpool*, without being allowed the privilege of trading. But on the facts, I think the defendant must be considered liable on this policy; for the ship has done no more than he intended she should. Before, however, I advert to the form of the objection, I will merely state the leading circumstances:—By the original policy, the vessel had liberty to sell, barter, and exchange goods, and load, unload, and re-load goods, at all ports and places she might call at and

1819.

SANDERSON
v.
SYMONS.

proceed to. Under this general liberty to sell, barter, &c. the Jury thought that she had liberty to trade. After this policy had been effected, the plaintiffs caused the words "*and trade*" to be inserted in the risk, not thereby intending to defraud the underwriters, or conceal such interlineation from them; for one of them went round to the different underwriters, for the express purpose of obtaining their assent to the alteration: some agreed, and others objected to it, after they had set their initials against those words, thereby signifying their assent. As well on the face of the instrument as by the finding of the Jury, the alteration appears to be immaterial; for though the defendant's broker refused to subscribe his initials to the interlineation, still he would remain liable on the policy as it originally stood. It appeared at the trial of the former cause, that the vessel did not go from port to port, although she had a liberty given her to trade generally. With respect to former decisions, this case does not appear to me to come within them. It is quite clear, that if a deed be altered in a material part by a stranger, it becomes void; so if there be an immaterial alteration by a party, it also avoids it. The general meaning of that rule was, rather to ascertain the identity of the instrument than guard against fraud;—but this case depends on its own circumstances. After the plaintiffs had caused the interlineation to be made in the policy, all the underwriters were requested by them to assent to the alteration; it was not therefore done without their privity; and all the previous decisions turn on alterations which are made without such privity. Those underwriters, in this case, who put their initials against the words introduced, expressed their consent to their introduction, and were bound by the policy in its altered state; those, however, who refused to do so on its being exhibited to them for that purpose, were bound by the policy as it originally stood. In the cases of *Langhorn v. Cologan*, and *Fairlie v. Christie*, the substance of the instrument was changed by the alteration; but here the interlineation was submitted to all the parties for their

assent after it was made, and those underwriters who refused to adopt it remained liable under the original policy.

1819.

SANDERSON
v.
SYMONS.

Mr. Justice PARK.—The second count of the declaration is founded on the policy as it originally stood, which contained a liberty to sell, barter and exchange, load, unload and re-load goods, at all places the ship might call at and proceed to; and after the underwriters had subscribed it in that form, the assured caused the words "*and trade*" to be inserted in the risk. It was most properly considered by the Jury, whether the introduction of those words made any difference, and they found by their verdict that they did not. Such finding is founded on common sense; for the words *sell*, *barter*, and *exchange*, necessarily imply a trading.— Besides, it was proved, that, according to the nature of voyages of this description, a trading to *Africa* might fairly be implied. Without, therefore, enquiring into the doctrine laid down in *Pigot's case* (a), or *Lord Darcy v. Sharpe* (b), as to the effect of alterations in mercantile or other instruments, it was fully considered by Lord Kenyon, and Mr. Justice Buller, in *Master v. Miller* (c), where the latter differed from the rest of the Court, and doubted whether a material alteration in a mercantile contract avoided the instrument; but the question, in this case, arises on a policy of insurance, and in all the causes decided on instruments of this description, (that of *Hill v. Patten* (d), being entirely out of the question,) the Courts have considered the materiality of the alteration. In *Campbell v. Christie* (e), a policy from *Calmar* to *Portsmouth* was altered, by inserting the words "*or Weymouth*" after *Portsmouth*, and it was held, that the alteration avoided the policy, as against an underwriter who was ignorant of its being made, for that the risk was thereby increased; so in *Langhorn v. Cologan*, the policy was executed without any specific subject

(a) 11 Rep. 27. — (b) 1 Leon. 282. — (c) 4 Term Rep. 320. — (d) 8 East 373. — (e) 2 Stark. Rep. 64.

1819.

 SANDERSON
 v.
 SYMONS.

of insurance being inserted, but which was afterwards added. And in *Fairlie v. Christie*, the alteration of the time of sailing was most material, as it was enlarged from the 10th of *October* to the 31st of *December*. But here the alteration is immaterial, as the risk, as it before stood, would warrant a trading voyage to *Africa*.

Mr. Justice BURROUGH.—If the addition of the words “*and trade*,” had altered the construction to be put on the policy, I think the plaintiffs would not be entitled to recover; but by the terms of the original contract, the risk was described at and from *Liverpool* to the vessel’s ports of discharge and loading in *Africa*, or *during her stay* there. These words, therefore, comprehend a trading; but further liberty was given her to *sell, barter, exchange, load, and re-load goods*; therefore the addition of the words “*and trade*” amount to nothing, as a trading is clearly comprehended during her stay at *Africa*. There is, therefore, no alteration in substance; and a Jury of merchants have found that the introduction of these words in the policy was immaterial. From the case of *Master v. Miller* to the present time, the materiality of the alteration has been the sole question; that was the ground on which the case of *Fairlie v. Christie* was decided, and in *Lord Darcy v. Sharpe* the alteration was not deemed material.

Mr. Justice RICHARDSON.—The only question is, whether the defendant in this case is discharged from his original contract by the interlineation of the words “*and trade*”; and I think he is not, as the alteration is immaterial, and as the assured afterwards requested the defendant, as well as the other underwriters, to adopt them. It has been said, however, that the alteration varies the identity of the instrument, as against him, and that, as it now stands, the plaintiffs cannot recover on either of the counts in their declaration; but I think otherwise; for, as the defendant had not consented to the alteration,

they had a right to declare on the policy as it originally stood, as the substance of the instrument would be thereby set out, and therefore that it would not be a variance on its being produced with those words inserted therein. The true nature and substance of the contract was, that the assured should be entitled to go to and trade at *Africa*, and the policy, as it now stands, would identify such purpose.

1819.

 SANDERSON
 v.
 SYMONS.

Rule discharged.

WILLIAMSON, Demandant; MEGGISON, Tenant; BEAUMONT, Vouchee.

Wednesday,
 Nov. 24th.

Mr. Serjt. *Hullock* moved, that this recovery, which was suffered in *Easter Term* last, might be amended, by inserting the words "Perpetual Advowsons," and striking out those of "Tithes to Rectories belonging and appertaining," on an affidavit, which stated, that it was intended to pass two perpetual advowsons, but that instead of so doing, they had been described in the recovery as rectories, and that no tithes were inserted in the deed to lead the uses. It appeared by the deed that the premises were described as the perpetual advowson of the rectory of *Kirkage*, and also the perpetual advowson of *Cambresman*.

A recovery may be amended by substituting the words "perpetual advowsons" for those of "tithes to rectories belonging," &c. if the words "perpetual advowsons" only are inserted in the deed to lead the uses.

Fiat.

1819.

Wednesday,
Nov. 24th.

BRITTAIN v. KINNAIRD, Esq. and Another.

Where a Justice of the Peace has jurisdiction, his conviction is conclusive evidence of the facts stated in it, if no defect appear on the face of it. Therefore, where in an action of trespass against two Justices for seizing and detaining a decked and registered vessel on the *Thames*, having gunpowder on board, under the Bum Boat Act, 2 Geo. 3. c. 28.—Held, that the owner could not be let into evidence, to shew that she was not a boat within the meaning of that statute.

THIS was an action of trespass, brought against the defendants as two of the Magistrates of the *Thames* Police Office, for seizing and taking possession of a vessel of the plaintiff, called the *Phoenix*, with her masts, sails, and furniture, and 500 pounds weight of gunpowder, and six casks containing it, and detaining the same for a long time, whereby the plaintiff was prevented from selling the powder, and deprived of the use of his vessel. Plea, Not Guilty. At the trial of the cause before Lord Chief Justice Dallas, at *Westminster*, at the Sittings after the last Term, it was proved that the plaintiff was the owner of the *Phoenix*, which was a decked and registered vessel of fifteen tons burthen, and which had been seized by the *Thames* Police-officers, and condemned by the defendants, under the Bum Boat Act (a). Several witnesses were called for the plaintiff, to prove that the vessel in question could not be considered a boat within the meaning of that statute; when a conviction, made by the defendants, was put in, framed under the statute, and which stated that "The plaintiff unlawfully had in his possession, in a certain boat on the River *Thames*, certain stores; to wit, 350 pounds weight of gunpowder, and 48 pounds weight of ball cartridges, which had then lately been unlawfully procured from and out of a ship or vessel in the said River *Thames*; and that as he had not produced the party from whom he bought the same, nor given any account, to the satisfaction of the defendants, how he came by the said stores, they adjudged him to pay £5, and that the boat, together with her tackle, &c. had become forfeited, and they ordered the same to be disposed of as the law directed." His Lordship was of opinion, that this

(a) 2 Geo. 3. c. 28.

conviction was conclusive, to shew that the vessel was a boat, and that the plaintiff was precluded from giving evidence that she was a ship or vessel, and not a boat, within the meaning of the statute, and accordingly directed a nonsuit, but reserved the point for the consideration of the Court.

1819.
BRITAIN
v.
KINNAIRD.

Mr. Serjt. *Faghan*, on a former day in this Term, obtained a rule *nisi* that this nonsuit might be set aside, and a new trial granted; and contended, that a decked and registered vessel could not be considered as a boat;—which alone was liable to seizure under the act. That the conviction could not operate conclusively so as not to admit evidence of her being a vessel of a different description, and that although she appeared to be a boat on the face of the conviction, still, that the defendants, as Magistrates, had no jurisdiction to term her so. In *Welch v. Nash* (a) it was held, that an old highway could not be stopped up by order of Magistrates, under the 13 Geo. 3. c. 78. before a new one was set out; and Lord *Ellenborough* there said (b), that “Justices cannot make facts by their determination, in order to give themselves jurisdiction contrary to the truth of the case; and that however desirous the Court might be of consulting the convenience of individuals, yet that they could not extend the jurisdiction of others any more than they could their own;” and Mr. Justice *Lawrence* said, that “Justices cannot give themselves jurisdiction in a particular case, by finding that as a fact which is not the fact;” and in *Davison v. Gill* (c) it was held, that an order of Magistrates under that statute for turning a road, must pursue the form prescribed therein; and that unless it stated the exact length and breadth of the new road set out, it was a nullity.

Mr. Serjt. *Lens* now shewed cause. The only question is, whether the conviction remains unquashed; if it does, it is a

(a) 8 East, 394. — (b) *Id.* 403. — (c) 1 East, 64.

1819.

BRITTAIN
v.
KINNAIRD.

complete answer to this action, for where a Magistrate has jurisdiction, a conviction made by him within the scope of it cannot be impeached, and can only be got rid of by appeal or *certiorari*. Whether the vessel were a boat or not, was a question before the Magistrates, and which they were called on and empowered to decide. Even if it had not been a boat, and they had convicted the plaintiff rashly, his only remedy would have been to proceed against them by information. They adjudged it to be a boat, and that the plaintiff had been guilty of a misdemeanor, in having stores illegally on board her; and they had full power and jurisdiction to make such adjudication. No collateral facts can be enquired into while the conviction remains unimpeached, and therefore there is no foundation whatever whereon to found the present action.

Mr. Serjt. *Vaughan* and Mr. Serjt. *Lawes*, in support of the rule, submitted, that the conviction was not of itself conclusive evidence to preclude the plaintiff from shewing that the Magistrates had no jurisdiction. They had power to find that the plaintiff had been guilty of a misdemeanor in having gunpowder on board his vessel, but were not authorised to adjudge whether she were a boat or not. If she had been a ship of the line, and they had adjudged her to be a boat, would the Court be estopped by the conviction, from ascertaining whether she were a boat or a ship? The party aggrieved might, in such a case, clearly shew the want of jurisdiction in the Magistrates over the subject-matter. The fifth section of the 2d Geo. 3. c. 28. (a) which enacts that boats

(a) By which it is enacted, that it should and might be lawful for the master, wardens, and assistants of the *Trinity House*, or such persons as they should from time to time depute and appoint, under the seal of their corporation, and for all owners or masters of vessels, either in whole or in part, in the river *Thames* respectively, or for such persons as the said owners and masters, or any seven or more of them, by writing under their hands and seals, should for that purpose depute, nominate, and appoint (and which it should be lawful for them from time to time to do) at any

1819.

 BRITTAIN
 v.
 KINNAIRD.

may be detained, cannot apply to vessels with decks. The defendants therefore had no jurisdiction over the vessel in question, as their authority was limited both as to the person and subject-matter. A Magistrate cannot assume jurisdiction, by mis-stating the fact on which such jurisdiction is founded; if he does, he is liable to an action. In *Welch v. Nash (a)*, it was held, that if a new highway were not set out before the old one was stopped up, the legality of the order of the Justices for diverting the old road, and stopping it up, might be questioned in an action of trespass, although such order was confirmed by the Sessions on appeal, but there the old highway was merely widened, which was deemed to be insufficient to answer the purpose of a *new* road. Whether an adjudication be in the nature of an order or conviction, the same rule is applicable, *namely*, whether the party against whom it is made be concluded by it or not. Here, however, the conviction is summary, and can neither be got rid of by appeal or *certiorari*, but it cannot be deemed conclusive of all the facts stated in it, and more particularly so, where the convicting Magistrates have exercised an excess of jurisdiction. Where there is such an excess, the party aggrieved may go

times from and after the 30th of June, 1762, to stop, search, and detain, in some place of safety, any boat which there should be reason to suspect had any ropes, cordage, tackle, apparel, furniture, stores, materials, or any part of any cargo or lading, stolen or unlawfully procured, from or out of any ship or vessel in the said river; and also to apprehend and detain, or cause to be apprehended and detained, any persons who might be reasonably suspected of having or conveying any such goods, stores, or things in such boat, and such persons so apprehended should be (as soon as conveniently might be) conveyed before one or more Justices of the Peace for any county, city, division, liberty, or place, adjoining to the said river. And that if such persons should not produce the parties from whom he, she, or they, bought or received such merchandizes, &c. *afore-said*, or some credible person to depose upon oath the sale or delivery thereof, or should not give an account to the satisfaction of the Justices, how he, she, or they came by the same, that then the said persons so apprehended should be deemed and adjudged guilty of a *misdemeanor*, and such boat, with her tackle, &c. should, upon such conviction, be forfeited, and disposed of as is thereafter directed.

(a) 8 East, 394.

1819.

 BRITAIN
 v.
 KINNAIRD.

into proof of matters *dehors* the conviction. The express object of the statute 2 Geo. 3. c. 28. was to prevent the committing of thefts by persons navigating bum or open boats on the River *Thames*, and by the 17th section of that statute (a), a Magistrate, on conviction, may order a boat to be burnt. There the word *boat*, with her tackle alone, is made use of, and consequently the Magistrates in this case could have no jurisdiction over a decked and registered vessel. It is true, that by the 54th Geo. 3. c. 187. s. 22. (b) forfeited boats, instead of being burnt, may be restored or sold, but that is merely a modification of the enactment in the 17th section of the former statute, and can apply only to boats of a like description as are mentioned in that act. The jurisdiction of the Magistrates in this case, therefore, was limited to person, place, and subject-matter, all of which are traversable; if not, a Magistrate could not be impugned for a want or excess of jurisdiction. First, as to place; if the defendants had

(a) By which it is enacted, that where any persons should be convicted of any offence against that act, by which is incurred the forfeiture of any boat, with her tackle and appurtenances, and concerning which, after such conviction, no provision was thereby made, it should and might be lawful to and for such Justices of the Peace, before whom such conviction should be had, or any other Justices of the Peace of and for any county, city, division, liberty or place adjoining to the said River *Thames*, on conviction had, and they were thereby respectively authorized and required, to cause such boat, with her tackle and appurtenances, to be totally burnt and destroyed, within six days next after such conviction as aforesaid, by warrant under the hands and seals of such Justices, directed to the constable or other peace officer of the parish or place adjoining to the said river, or where such conviction should be had; which said constable or other peace officer, should thereupon cause such boat, &c. to be so burnt and destroyed within the time aforesaid.

(b) Which enacts, that in all cases in which it was directed that any boat with her tackle and appurtenances which should be forfeited, should be burnt and destroyed, it should be lawful for any Justices, within their respective jurisdictions before whom any persons should have been convicted of any offence, whereby any boat was or should be adjudged to be forfeited, either to direct such boat with her tackle and appurtenances to be burnt and destroyed, or restored to the owners thereof, or to be publicly sold, and the produce of such sale to be applied in like manner as in all other cases of forfeitures under the said act.

found that the plaintiff was in his vessel on the River *Thames*, with certain stores in her, in the County of *Middlesex*, and such vessel were on a part of that river situate in another county, the adjudication would be bad, because their jurisdiction would be limited to the county where the offence was committed, and parol evidence might be given of that fact, contrary to the conviction; so, *secondly*, as to the subject-matter; as the defendants have condemned the vessel in question as a boat, if she be not so, they have exceeded the limits of their jurisdiction, and the fact may be enquired into. In *Perkin v. Proctor* (a), the question was, whether a victualler were a trader within the bankrupt laws; and an action of trespass was commenced, on the ground that the Commissioners had no jurisdiction to enquire into the nature of that fact, as they had merely a limited authority; and the Court were of opinion that the commission of bankruptcy was void, and of no avail; the jurisdiction concerning bankrupts being confined to particular persons and cases; and the Court there held, that where Courts of justice assume a jurisdiction which they have not, an action of trespass lies against the officer who executes process, because the whole proceeding is *coram non judice*; and in the case of the *Marshalsea* (b), it was adjudged, that where there was no jurisdiction at all there was no Judge, and the proceeding was as nothing. In the case of a poor rate, if the person rated be not an occupier within the parish, the proceeding is *coram non judice*, because such person cannot be assessed. In *Terry v. Huntington* (c), where Commissioners of Excise decided, that low wines were strong waters, it was held to be a proceeding *coram non judice*, as they had only a stinted or limited jurisdiction. So here, the defendants had no more right to condemn the plaintiff's vessel than a seventy-four gun ship. Lord *Hale*, in *Terry v. Huntington*, drew a distinction between a civil and criminal proceeding, for, he observed, that "the

1819.
BRITAIN
v.
KINNAIRD.

(b) 1

(a) 2 *Wils.* 382. — (c) *Hardres*, 480,

1819.

 BRITTAIN
 v.
 KINNAIRD.

proceeding there was *civiliter*, not *criminaliter*, as in *Nudigate's* case (a), but that the case of a Justice of Peace seemed to come fully up to that case, for the Justice had a jurisdiction, but he kept not within it; and suppose the Commissioners should adjudge small beer or water to be strong beer, it would be mischievous if the subject, in such a case, should have no action upon a distress taken for a forfeiture." It has been said, that the plaintiff's only remedy is by information, but he may go into evidence *dehors* the conviction. Though a special verdict find facts, it does not deprive a party from going into evidence. In cases of limited jurisdiction, facts must be enquired into, in order to ascertain whether a conviction be contrary to truth or not. But too much stress has been laid on the effect of this conviction; for, in *Henshaw v. Pleasance* (b), and *Milward v. Caffin* (c), it was decided, that even if a Magistrate make an adjudication within his jurisdiction, it is not conclusive as to the facts stated in it. By the 21 Geo. 3. c. 55. s. 47. it was enacted, that condemnations made by a Magistrate should be final; if therefore they had before been considered so, there would have been no necessity for passing that statute, but in the same session that statute was repealed by the 21 Geo. 3. c. 64. and therefore left the question precisely as it before stood. On these grounds, therefore, the defendants in this case had only a consequential power given them by the 2 Geo. 3. c. 28. to condemn a boat, but no judicatory power to determine whether the plaintiff's vessel was a boat or not, within the meaning of that statute. They have therefore condemned a vessel not within their jurisdiction, and consequently not a subject-matter of the conviction.

Lord Chief Justice DALLAS.—The general principle applicable to cases of this nature is perfectly clear, established by ancient, and recognised in modern decisions, which is, that if a Magistrate having jurisdiction over the subject-mat-

(a) 12 Rep. 25. — (b) 2 Sir W. Bl. 1174. — (c) 2 Sir W. Bl. 1330.

ter, make a conviction, such conviction, if nothing appear on the face of it to vitiate or render it void, is conclusive evidence of the facts stated in it, if an action of trespass be brought against him. Such being the principle, what are the facts of this case? It has been admitted in the argument, that if the subject-matter be a boat, the conviction is right, as it states the vessel in question to be a boat; but it has been said, that it must be a boat to give the Magistrates jurisdiction, and that if it be not, a party aggrieved may contradict its being so by extrinsic matter. I agree, that if the defendants had no jurisdiction to enquire into the fact, whether it were a boat or not, the conviction would signify nothing. The only question then is, whether, in this case, they had jurisdiction or not, and what was the nature of the offence they were empowered to enquire into. By the 2 Geo. 3. c. 28. they were authorised to stop, search, and detain any boat on the River *Thames*, suspected to contain any stores or gunpowder, stolen or unlawfully procured from any ship in that river. Although the word *boat* may be applied to vessels of a technical description, still, whether the vessel in question were a boat or not was a matter of fact to be proved before the defendants as Magistrates; for it was their duty to hear and determine the nature of the charge brought against the plaintiff, when they were to form their own conclusion as to the effect of such evidence. But it has been said, that where the jurisdiction of a Magistrate is limited as to person, place, and subject-matter, that it is stinted in its nature, and cannot be exceeded. To that position I fully agree; but before it is so stinted, the person, as well as the place and subject-matter, form questions to be decided by the evidence before the Magistrates. Here, whether this vessel were a boat or not, was part of the subject-matter which the defendants were authorised to enquire into. Her having gunpowder on board, was part of the offence charged; how, therefore, could they have convicted the plaintiff, without ascertaining, by the evidence before them, and determining whether she were a boat

1819.

BRITTAIR
v.
KINNAIRD.

1819.

 BRITTAIN
 v.
 KINNAIRD.

or not? It not only came within the general scope of their jurisdiction, but did so, *ex necessitate rei*. Still it has been said, that Magistrates cannot give themselves a jurisdiction; by finding a fact which did not exist. But they are bound to enquire as to such fact, and to determine according to the evidence adduced when they have a jurisdiction over the subject-matter; and their conviction is conclusive. Here, the defendants have made an enquiry, and by their conviction stated that the subject-matter was a boat. That, therefore, is conclusive. A great deal has been said as to the danger that might accrue from Magistrates giving themselves jurisdiction, and extreme cases have been put, as that of calling a ship of the line, or a seventy-four, a boat. Even if it were so, if the conviction be good upon the face of it, and term such ship a boat, it would be conclusive. It has been further said, that the party aggrieved is without remedy, unless this action can be supported; it is true that he is without a civil remedy, but he still may have recourse to a criminal proceeding. If the facts were so gross, and the defendants had decided that a man-of-war was a boat, it would not only be an abuse of power, but furnish sufficient grounds for a criminal proceeding. There is another principle on which this action cannot be supported; formerly, the rule was to intend every thing against a stinted jurisdiction, but now, nothing is to be intended but what is fair and reasonable; and it is a fair and reasonable intendment, that Magistrates will act uprightly in the discharge of their duty as such, and therefore a summary jurisdiction is vested in them, and their determination is final. It is a great benefit to the public, that their determination in cases of this and a like nature, should be so. Cases however, have been referred to in the course of the argument, which, it has been contended, tend to shew a different doctrine. The principle laid down in *Terry v. Huntington* (a) is, that an action of trover will lie against an officer for ex-

(a) *Hardres*, 480,

1819.

BRITTAIN
v.
KINNAIRD,

executing process of a limited jurisdiction beyond its limits, but it was there admitted, that if the Commissioners had had jurisdiction, and had adjudged low wines to be strong waters, or small beer strong, that such adjudication could not have been enquired into by action; and Mr. Baron *Rainseford* there said, that "the defendants might well enough have justified by virtue of an authority from the Commissioners of Excise, who were judges of the fact, and that their authority was not traversable by the plaintiff, who must have taken his remedy by appeal. But that if the Commissioners exceeded their authority, and it so appeared to the Court, that then their proceedings were *coram non judice*, and that an action of trespass lay, but that if that did not appear, it would be otherwise. That in that case it appeared by the special verdict, that the Commissioners had exceeded their authority in adjudging low wines to be strong waters, perfectly made, which were of another species, and that if the Commissioners would adjudge rose water to be strong water, they would exceed the power given them by their commission." Apply that to this case. If it had appeared on the face of this conviction, that the Magistrates had no jurisdiction, as it there did, that the Commissioners had not, then they would have most clearly exceeded their authority. In the case of *Dr. Groenvelt v. Burwell (b)*, Lord *Holt*, in commenting on the case of *Terry v. Huntington*, observed, that it was admitted there, that if the Commissioners had had jurisdiction of the cause, though they had given a wrong judgment, as if they had adjudged small beer to be strong, their judgment could not have been examined in an action. Here, however, the Magistrates had a general jurisdiction over all boats having gunpowder on board on the River *Thames*. So in *Terry v. Huntington* the Commissioners had a general jurisdiction over beer. That case, therefore, is scarcely distinguishable from the present. Here nothing appears on the

(a) † Lord *Raym.* 471.

1819.

BRITTAIN
v.

KINNAIRD.

face of the conviction to vitiate it, and the plaintiff has still his remedy by filing a criminal information if he think proper to do so. In *Gray v. Cookson* (a), the cases of *Welch v. Nash* (b) and *Crepps v. Durden* (c) were adverted to, in the former of which, Mr. Justice *Lawrence* said (d), that "the Justices could not give themselves jurisdiction in a particular case by finding that as a fact which was not the fact;" but Mr. Justice *Bayley*, in *Gray v. Cookson* (e) distinguished that case, as it turned solely on an *ex parte* order of magistrates, which bore no analogy to a conviction where the matter is investigated on oath in the presence of both parties. As well, therefore, on the decision of *Gray v. Cookson*, and the other cases, as on principle and reason, I am of opinion that this conviction is conclusive, and consequently that the present rule must be discharged.

Mr. Justice *PARK*.—My Lord Chief Justice has gone so fully into the principles by which this case must be governed, that perhaps I need only express my entire concurrence; but as it is of an important nature, I shall shortly state my reasons for so doing. It is of importance, because it is highly necessary to protect magistrates in the execution of their duty. All the cases adverted to in the argument, appear to me to militate against the doctrine contended for by the plaintiff. From the case of *Terry v. Huntington* to *Ackerley v. Parkinson* (f), one leading principle has been established, viz. that where a conviction is made by a magistrate for an offence over which he has competent jurisdiction, such conviction is conclusive evidence of all the facts stated in it. In *Dr. Groenvelt's case* (g), Lord *Holt* was of opinion, that "a man convict by the defendants, in pursuance of their judicial authority, could not traverse the fact of

(a) 16 *East*, 13. — (b) 8 *East*, 394. — (c) *Cowp.* 640. — (d) 8 *East*, 403.
(e) 16 *East*, 23. — (f) 3 *Maule & Selw.* 411. — (g) 1 *Lord Raym.* 467.

1819.

BRITTAIN
v.
KINNAIRD.

which he is convict, because the authority of the defendants was absolute to hear and determine the offence; and that when in pursuance of the said authority they had adjudged the plaintiff guilty, he could not arraign their judgment, but was concluded; for that persons who are judges by law, shall not be liable to have their judgments examined in actions brought against them." Commissioners of bankrupts have been alluded to, but they are not to be considered in the same light as Justices of the Peace, for Lord Holt, in *Groenvell's case*, said (a), that "commissioners of bankrupts may commit a man for refusing to be examined concerning the estate of the bankrupt, but that they are not judges, and that their proceedings are traversable, because their power of imprisonment is only *quousque*, &c." In *Gray v. Cookson*, the statute 43 Geo. 3. c. 141, was relied on, as to the protection afforded to magistrates, and the question was, whether they were not protected as long as the conviction stood, and the Court held, that it could only apply to cases where the conviction was quashed; and Lord Ellenborough said (b), that "Magistrates were before protected in an action of trespass by a subsisting conviction good upon the face of it; that the act meant to protect them still further to a certain extent in a case where before they were left unprotected by the quashing of the conviction. And his Lordship added, that even before that statute, he had always considered, that if a conviction were produced at the trial, which would justify the imprisonment, that it was sufficient." Here the conviction was produced at the trial, and nothing objectionable appeared on the face of it. The case of *Ackerley v. Parkinson* is extremely strong; there an action on the case was held not to lie against the vicar-general of a bishop for excommunicating the plaintiff for contumacy, in not taking upon himself administration of an intestate's effects, although the citation

(a) 1 Lord Raym. 467. — (b) 16 East, 21.

1819.
 ~~~~~  
 BRITTAIN  
 v.  
 KINNAIRD.

by which the plaintiff was cited was void; for the Court said, "that the vicar-general had still jurisdiction over the subject-matter." In *Strickland v. Ward (a)*, Mr. Justice Yates, before whom that case was tried; was of opinion that the conviction could not be controverted in evidence; that the Justice having a competent jurisdiction of the matter, his judgment was conclusive till reversed or quashed, and that it could not be set aside at *Nisi Prius*. But here the plaintiff was precluded from going into evidence at the trial, whether the vessel in question were a boat or not; but even if he had, it would be extremely doubtful whether she did not fall under that description, for the word does not apply to an open boat only, as Dr. Johnson, in his Dictionary, describes a boat as "a ship of small size, as a passage-boat, advice-boat, fly-boat;" and Falconer, in his Marine Dictionary, says, that "a boat is open or decked, according to the purpose for which it is intended." I therefore am of opinion, that there was no ground whatever for the plaintiff to maintain this action.

Mr. Justice BURROUGH.—It has never been doubted, within my recollection, that a conviction having no defects on the face of it, is conclusive evidence of the facts it contains, if it be made by a magistrate having jurisdiction to do so, and that it cannot be impeached or got rid of except by *certiorari* or appeal. Here the defendants had jurisdiction by the statute 2 Geo. 3. c. 28, over bum-boats and others found on the River Thames, and in the exercise of that jurisdiction, it was their duty to summon the parties before them, and hear all the facts relative to the seizure, when they were to decide according to the nature of the evidence adduced before them, and the conviction founded on such facts is conclusive. They had, therefore, not only a jurisdiction in part, but

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(a) 7 Term Rep. 634, n.

having considered on the evidence, their decision was final. Two cases have been pressed on the Court, viz. those of *Welch v. Nash*, and *Perkin v. Proctor*. With respect to the first, there was an order of Justices for diverting a highway, which was expressly contrary to the provisions contained in the 13 Geo. 3. c. 78, for there was no plan of the road laid out in the order which was expressly required by the schedule in section sixteen, to accompany the order; besides, there, there was no litigant party; the public were interested, and the order was made on hearing *ex parte* evidence only, and was therefore not like a conviction, where both parties are summoned before the magistrate; that order, too, was not made by proceeding *in iuribus*, for it took place on the request of a private individual, and was bad on the face of it. As to *Perkin v. Proctor*, a commission of bankrupt, till the bankrupt surrender, is in the nature of an *ex parte* proceeding behind his back, and if he intends to dispute the commission, he has his remedy by action before he surrender himself, but afterwards he cannot have that remedy. But that has no application whatever to this case, where the party complained of must be a party to the transaction, who is summoned to appear before a magistrate prepared with evidence to rebut it. As to the hardship of the conclusiveness of a conviction of this nature, the right of appeal and *certiorari* being taken away by the Legislature, the Court cannot interfere, for by the statute, an express jurisdiction is given to the magistrates alone. The Legislature deemed it expedient that convictions made by them should be conclusive, and the Court cannot consider whether it be proper or not. The case of *Henshaw v. Pleasance* is wholly distinguishable from the present, as the question there turned on a condemnation in the Exchequer on a proceeding before the Commissioners of Excise. Besides, a conviction is conclusive of the facts stated in it, but a condemnation is not. I therefore entertain no doubt whatever on the present question, but think this rule must be discharged.

1819.

BRITAIN  
v.  
KINNAIRD.

1819.

BRITTAIN  
v.  
KINNAIRD.

Mr. Justice RICHARDSON.—I am entirely of the same opinion ;—whether the vessel in question had gunpowder on board, or whether she were a boat or not, were facts which the defendants had jurisdiction to decide. The fallacy lies in assuming, that previous to a conviction, a magistrate has no power to decide a matter of fact constituting part of the offence, as such fact also constitutes his jurisdiction ; but if a fact of this description could be questioned in a civil action, no magistrate would be safe, even though he acted within his jurisdiction. By the game laws, an authority is vested in a magistrate to convict unqualified persons found sporting contrary to such laws. Therefore if such magistrate convict a person for having a partridge in his possession, could, after conviction, in an action of trespass against him, evidence be adduced by the party convicted to shew that it was a woodcock ? The magistrate in such a case is fully empowered to enquire into the fact, and yet it might be contended in that case, that the magistrate had no jurisdiction unless the bird were a partridge ; as it has been urged here, that the defendants had none, unless the vessel in question were a boat. So, if in the case of a conviction by a magistrate against a person for keeping dogs for the destruction of game, without being qualified so to do, can it be said that such person, after the conviction, could in a civil action against the magistrate, be let into evidence to dispute the truth of such conviction, or shew the nature and description of the dog ? In questions of this sort, no evidence can be received *dehors* the conviction. A magistrate alone is empowered to ascertain the facts by an enquiry before him ; if not, he might be compelled to do so by *mandamus*. He might conclude, if a dog were brought before him of the species of a greyhound, that it was a greyhound, if it were proved to be used for the destruction of game. It would be a very hard case if a magistrate acting *bonâ fide*, and to the best of his judgment, having come to an erroneous conclusion on the facts before him, and which he was bound to enter into, should be liable to

have those facts disputed in an action brought against him by the offending party. On the general rule, therefore, that where a magistrate has jurisdiction, his conviction is conclusive evidence of the facts stated in it, in an action of trespass brought against him;—I fully concur with the Court, in thinking that this rule must be

1819.

BRITAIN  
v.  
KINNARD.

Discharged.

CROFT v. COGGS.

Friday,  
Nov. 30th.

THE defendant was arrested by the name of *Elizabeth*, and was so described in the bail-piece, but she put in and justified bail in the name of *Betsy*.

If a defendant be arrested by the name of *Elizabeth*, and put in and justify bail in the name of *Betsy*, the bail-piece may be amended on payment of costs, and a re-acknowledgment of the bail.

Mr. Serjt. *Onslow*, having on a former day obtained a rule nisi that the bail-piece might be amended, by altering the name of *Elizabeth* to *Betsy*,

Mr. Serjt. *Lawes* now shewed cause, and submitted, that there was, in fact, no bail in the action before the court, and that if the amendment were allowed, it would be quite a different cause, or that at all events the bail must be re-acknowledged,—and that although in *Anderson v. Noah* (a), a misnomer in the bail-piece was allowed to be amended, the objection was raised at the time of justification; and in *Bingham v. Dickie* (b) the Court would not amend a clerical error in the spelling of the plaintiff's name in the bail-piece, viz. *Tarbart* for *Tabart*, without the consent of the bail.

But the Court held, that the bail-piece in this case might be amended on payment of the costs of the irregularity, and a re-acknowledgment of the bail.

(a) 1 Bos. & Pul. 51. — (b) 5 Term. 814.



1819.

Friday,  
Nov. 26th.

## ARNOLD v. REVOULT.

In covenant on a lease for not repairing, the instrument was described in the declaration to be made by the plaintiff, of the one part, and the defendant, of the other. On the production of the lease in evidence, it appeared to have been made between the plaintiff and his wife, of the one part, and the defendant, of the other:—Held, that this was no variance, although the premises demised were the property of the wife before marriage.

THIS was an action of covenant on a lease, for not keeping premises in repair. The declaration stated the indenture to be made between the plaintiff, of the one part, and the defendant, of the other, and set out the covenant to repair as between the same parties. Plea, *non est factum*. At the trial of the cause before Mr. Justice Park, at the last Assizes at Croydon, on the production of the lease, it appeared to have been made between the plaintiff and Mary his wife, of the one part, and the defendant, of the other; and the covenant to repair was with the plaintiff and his wife. It further appeared, that the beneficial interest in the premises was in the plaintiff's wife, by purchase before marriage. For the defendant it was objected, that the lease was misdescribed in the declaration, and therefore that the variance was fatal, and the learned Judge being of that opinion, he accordingly directed a nonsuit.

Mr. Serjt. Onslow, on a former day in this Term, obtained a rule *nisi*, that this nonsuit might be set aside, and a new trial granted, and submitted, that the legal effect of the covenant was set out rightly in the declaration; that all the wife's interest was vested absolutely in the husband by marriage, and that all the covenants in the lease were in point of law covenants to him alone, as they would survive to him if he did not take out letters of administration; or were at all events vested in him alone, if they were not previously disposed of by the marriage settlement; and he relied on the cases of *Ankerstein v. Clarke*(a), where it was held, that if a bond be given to husband and wife administratrix, the husband alone may declare on it as on a bond made to himself,

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(a) 4 Term Rep. 616.


and *Beaver v. Lane* (a), where the husband alone brought an action on a covenant made to himself and his wife.

1819.  
  
 ARNOLD  
 F.  
 REVOLT.

Mr. Serjt. *Taddy* now shewed cause.—The property in question belonged to the plaintiff's wife before marriage, as she had purchased the lease from the executors of her former husband; and the defendant afterwards covenanted with the plaintiff and his wife, to both of whom the rent was reserved, she therefore ought to have been joined in the declaration. It is a general rule of pleading, that if a lease be *misdescribed*, in not setting out the names of one of the parties, the variance is fatal. But it may be said, that by the connection between husband and wife, their joint interest constitutes one right, which is vested in the husband, and that all acts after marriage must be done by him alone. It appeared at the trial, that the plaintiff's wife was originally possessed of the property in question for a term of years, and that the defendant held under her, and that after marriage another lease was granted to him, executed by her and her husband, the present plaintiff. The distinction, in cases of this description, is, where the acts of the wife are void, or voidable; in the former, it is neither necessary nor proper to describe her in the instrument, but in the latter, where the act done will bind her subsequently to the coverture, she ought to be joined. If a husband die during the term of a lease, and the wife subsequently receive rent, she cannot afterwards set it aside. So, if a wife join her husband in a lease during coverture, and receive rent afterwards, she cannot avoid it; for, in *Bacon's Abridgment* (b) it is said, "if a husband, seised of lands in right of his wife, make a lease thereof by indenture, reserving rent, that this is a good lease for the whole term, unless the wife, by some act after the husband's death, shews her dissent thereto; for that if she accepts rent which becomes due

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(a) 2 Mod. 217. — (b) Tit. Lease, C.

1819.  
  
 ARNOLD  
 v.  
 REVOLUT.

after his death, the lease is thereby become absolute and unavoidable, for the law has left her at liberty, after his death, either to affirm and make good such lease, or to defeat and avoid it, as she finds most subservient to her own interest. So, if the wife join in such lease for years by indenture, she is, after her husband's death, at liberty either to affirm it by acceptance of rent, or to dissent to or avoid it by bringing trespass, &c. in the same manner as if he had been no party thereto; for her joining during the coverture, when she was not *sui juris*, but under the power of the husband, will not bind her after his death; and if she chooses to avoid such lease, notwithstanding her joining therein, then it is so absolutely defeated *ab initio* as to her, that she may plead *non demisit*, because as to any interest that passed from her, she did not demise, nor in truth had any power to contract, but the whole interest passed from the husband, and the lessee is in merely by virtue of the husband's contract; and yet, because the lessee, by his acceptance of such lease, admitted them both to have power to join therein, he must accordingly, during the coverture, declare of the lease by them both, as an essential part of the description of the lease whereby he makes title." In *Gardiner v. Norman* (a), it was held, that if a lease be made by baron and feme, and they both give a letter of attorney to deliver the deed, it was the lease of the baron alone, and must be declared on as such, but that if the baron and feme had jointly delivered it, the delivery of the feme would not have been unimportant, since it must then have been declared on as the lease of both, although the lessee might be in possession by virtue of the husband's contract. In *Shipwith v. Steed* (b), which was an action of debt on bond for performance of covenants in an indenture between the defendant and his wife, of the one part, and the plaintiff, of the other, and the Jury found that the husband

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(a) Cro. Jac. 617. — (b) Cro. Eliz. 769.

sealed the deed, but not the wife—it was held, that if the husband had sealed and delivered it in the name of the wife, it had been her deed during the life of the husband, and that if they by indenture had bargained and sold land of the wife, rendering rent, it had been a good deed of the wife, because she might afterwards have accepted the rent, and made the deed good. In *Beaver v. Lane*, the action was brought on a covenant concerning the houses of the husband, and the objection was made after verdict in arrest of judgment, and was not set out on record as here; besides, the property in the present case was vested in the wife before marriage. In *Aleberry v. Walby* (a), it was decided, that covenant would lie by husband and wife for non-payment of rent due by virtue of a lease granted by the husband and wife, of lands the inheritance of the wife. In *Howell v. Maine* (b), which was an action of debt on bond made to the wife during coverture, it was held, that the husband and wife might join; and although it was there decided, that the husband might sue alone, still, if the declaration describe the instrument and the parties to it, such parties must be correctly described. In *Ramsden v. Ambrose* (c), where husband and wife lived separate, and she boarded in the plaintiff's house, who declared against the husband for necessities found and provided for him, and it appeared to be for the wife, it was held that the declaration could not be supported, as the plaintiff failed in his description of the subject-matter of the contract. [Mr. Justice Park.—In *Comyn's Reports* (d), it is said, that if a feme leases *dum sola* and marries, and the lessee pays his rent to the wife, though no notice of marriage alleged, the payment is ill; also, that the husband may sue alone for rent, for not repairing, &c. or other profits or benefits to the estate of the wife, and though he may, he need not join his

1819.  
  
 ARNOLD  
 v.  
 REVOLUT.

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(a) 1 *Strange*, 229.—(b) 3 *Lev.* 403. S. C. 1 *Selw. Ni. Pri.* 3d edit. 365, n.—(c) 1 *Strange*, 127.—(d) 674.

1819.  
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 ARNOLD
 v.
 REVOLUT.

wife. And *Croke Car.* (a) is cited in support of that position]. But here the parties were described in the deed as husband and wife, and should have been so set out in the declaration. [Mr. Justice *Burrough.*—In *Philliskirk v. Pluckwell* (b), it was held, that the husband and wife might sue on a promissory note, made to the wife during coverture.] Although in *Ankerstein v. Clarke*, it was held, that if a bond be given to the husband and wife, during coverture, the husband might sue alone, declaring on it as a bond made to himself, still that case is distinguishable from the present, as the bond there vested in the husband and his personal representatives absolutely, and did not survive to the wife; there, too, the act of the wife was void, but here it is merely voidable, and it would therefore have been improper, in that case, to have joined her in the declaration. But here, as the wife might have sued after the death of her husband, she should have been described in the declaration as she was in the indenture, according to the fact.

Mr. Serjt. *Onslow*, in support of the rule, was stopped by the Court.

Lord Chief Justice DALLAS was absent.

Mr. Justice PARK.—In this case, I was taken by surprise at the trial. The lease was produced, and it appeared to have been made between the plaintiff and his wife, of the one part, and the defendant, of the other, when it was objected for the latter, that it was not the deed set out in the declaration, as the plaintiff had declared on it in his own name without joining his wife, and I directed a nonsuit. If any doubt had been then raised by the plaintiff, I should have allowed the cause to have proceeded, and saved the point. It is a mere

(a) 338.———(b) 2 *Moule & Selw.* 398.

technical objection, and the general law has been waived by my Brother *Taddy*, in the course of his argument. The case of *Beaver v. Lane*, although it was moved in arrest of judgment, appears to me to be expressly in point, and was adopted and confirmed by Mr. Justice *Buller*, in *Ankerstein v. Clarke*, who said it was decisive of the question in that case. But it has been insisted here, that there is a material variance between the lease described in the declaration and that proved in evidence at the trial; but if the decisions in *Beaver v. Lane*, and *Ankerstein v. Clarke*, be considered as having any weight, there has been no misdescription in the present case. If it were a joint interest, it might make a material difference, but the wife had merely a chattel interest in the lands before marriage, which vested in the husband during coverture. The covenants therefore made to them after marriage, must in legal effect be considered as covenants made to the husband alone. In the case of *Ankerstein v. Clarke*, the objection was taken at *Nisi Prius*, as here, namely, that the bond produced varied from that declared on, which appeared to be given to the plaintiff, and his wife as administratrix, whereas it was declared on as a bond given to the plaintiff himself. That case, therefore, is particularly applicable to the present, and the Court were of opinion, that it was no variance. I therefore think that the nonsuit I directed at the trial was improper.

Mr. Justice BURROUGH.—If a deed be falsely described by a plaintiff in his declaration, it is a good ground of objection. But is this indenture so misdescribed? It is true that it appears to have been made between the plaintiff and defendant alone, which in point of fact is correct, as a deed may always be declared on according to its legal effect, which in this case would be by the husband alone during the life of his wife. The parties are therefore described according to that effect, as the plaintiff, of the one part, and the defendant, of the other. There can be no doubt but

1819.

ARNOLD
v.
REVOLUT.

1819.
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 ARNOLD  
 v.  
 REVOLUT.

that a promissory note made to the wife during coverture may be described in a declaration as being made to the husband, and as the husband in this case was solely interested, I am of opinion that he alone was properly named in the declaration.

Mr. Justice RICHARDSON.—I concur in thinking that it was no mis-statement or variance, because the indenture of lease was described in the declaration to be made by the husband alone, and proved to be made by him and his wife; and I principally rely on the case of *Beaver v. Lane*, which was afterwards recognized in *Ankerstein v. Clarke*. There, it was held, that although a covenant be made to husband and wife, yet that the former might refuse *quoad* her. So here, the husband may refuse as to her, and bring the action alone, and more particularly so, as this is a mere chattel interest, and has no reference whatever to the statute 32 Hen. 8. c. 28. The plaintiff, therefore, might make a lease alone, and the joinder of the wife can make no difference whatever. This, therefore, can no more be considered as a variance than in the cases of bonds and promissory notes, which, although they are made to the wife, may be declared on as being made to the husband. That was fully established in the case of *Ankerstein v. Clarke*, where it was held, that if a bond be given to husband and wife administratrix, the husband might sue alone, declaring on it as a bond made to himself. So the description of the parties in this case is according to the legal effect of the instrument, and this rule therefore must be made

Absolute.

1819.

## SALMON v. WATSON.

Friday,  
Nov. 26th.

THIS was an action of *assumpsit* founded on a parol agreement between the plaintiff and defendant, respecting a house which the latter took of the former, and with which he was to take the fixtures at a valuation to be made by two brokers. The declaration contained counts for goods sold and delivered, as well as the common money counts, and a count on an account stated.

The defendant agreed verbally with the plaintiff to take a house and purchase the fixtures at a valuation to be made by two brokers. An inventory of the furniture and fixtures was accordingly made, described generally as "An inventory of the fixtures, &c." with the gross amount placed at the foot thereof. In an action for goods sold and delivered, with a count on an account stated: Held, that the defendant having taken possession of and enjoyed the furniture and fixtures, and paid part of the sum determined by the brokers, to be due for the same, he was liable on the account stated for the remainder, and could not afterwards object to the plaintiff's defective title to the house.

At the trial of the cause before Mr. Justice *Park*, at the last assizes at *Croydon*, it appeared that the defendant took possession of the house and fixtures, and that the valuation was made by two brokers, but that among the articles valued and included in the inventory, and which the defendant consented to take, there was household furniture not coming under the description of fixtures; but that the inventory was headed generally, "An inventory of the fixtures, &c." Those articles of furniture were distinctly marked off, and valued by the brokers, who signed the inventory, making the defendant a debtor to the plaintiff to the amount of £137 for the whole of the fixtures and furniture. It was proved, that the defendant had paid £30 on account, and that the furniture mentioned in the inventory, amounted to £20: 12s. For the defendant it was contended, that the plaintiff was not entitled to recover on the authority of the case of *Lee v. Risdon (a)*, where it was decided, that an action for goods sold and delivered would not lie for fixtures, and consequently that the plaintiff could not resort to the counts for goods sold, and that he must be bound by the inventory in which the brokers had made their valuation for fixtures, and that consequently the contract was

(a) 3 *Marsh.* 495.



1819.  
  
 SALMON  
 v.  
 WATSON.

entire, and that he could not go for less than the whole of the amount of the valuation, and as the greater part of that sum was for fixtures, he could not recover for the furniture which formed the other part of the inventory.—For the plaintiff it was insisted, that he had a right to recover for all the articles of furniture which it was proved the defendant had taken possession of, and which could not come under the denomination of fixtures; that although the brokers had included certain articles of furniture as fixtures in the inventory, that it could not render them so; but that the different descriptions of furniture or fixtures were to be taken according to their avowed import; that the agreement being by parol, could apply to fixtures only, for which, even if the plaintiff could not recover, yet that as to the furniture, it was not included in that agreement at the time the house was taken, but were matters of subsequent purchase, for which the defendant should pay without any reference to the fixtures, and for which the plaintiff was entitled to a distinct action for goods sold and delivered, and that he could not be deprived of his right to recover by the mistake of the brokers;—that the contract, as well for the fixtures as the furniture, was executed, and that as the defendant was in possession of both, the plaintiff might recover for the fixtures on the count for an account stated, the brokers having settled the balance of £137, as due from the defendant to the plaintiff, and as the former had paid part of the amount on account, he had thereby admitted this sum to be correct, and that the plaintiff was therefore entitled to recover. The learned Judge, however, was of opinion, that the plaintiff could not recover for the fixtures on the authority of *Lee v. Bidson*, and that the inventory was conclusive, it being headed, “An inventory of the fixtures, &c.” thereby making the contract entire as to both the furniture and fixtures, and that the plaintiff could not recover for the fixtures on the counts for goods sold and delivered, nor on that on an account stated, and he consequently directed a nonsuit.

Mr. Serjt. *Taddy*, on a former day in this Term, obtained a rule *nisi* that this nonsuit might be set aside and a new trial granted. He submitted, *first*, that this was not an entire contract, and that the plaintiff might recover for those articles of furniture which were not fixtures under the counts for goods sold and delivered. It is true there is a wide difference between contracts void at common law, and those which are void by statute; for in *Norton v. Simmes (a)*, a distinction was taken between an instrument made void by statute, and by the common law, for a statute is a strict law, but the common law doth divide according to common reason, and having made that void that is against law, lets the rest stand. So in *Pigot's case (b)*, it was held, that if some of the covenants in an indenture were against law, and some lawful, the first were void, and the others stood good. In *Newman v. Newman (c)* it was held, that in a bond conditioned for the performance of several things, if one of them be void at the common law, yet the bond may be good for the others. So the case of *Robinson v. Bland (d)*, decided, that if a lawful engagement can be separated from an unlawful one, it is not vitiated from having been mingled with it. Here, therefore, the contract was clearly divisible, and the plaintiff was entitled to recover the value of the furniture. *Secondly*, the contract having been executed, and the defendant having agreed to pay the amount of the valuation made by the brokers, and they having settled such amount at £137, the plaintiff's demand was recoverable under the count on an account stated.

1819.

SALMON  
v.  
WATSON.

Mr. Serjt. *Lewes* now shewed cause.—The nonsuit was perfectly correct. The only question is, whether the plaintiff can recover on an account stated. The cases as to the divisibility of contracts, are not applicable to the present, as it turns on the effect of a particular contract, which was en-

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(a) *Hob.* 14.——(b) 11 *Rep.* 27 b.——(c) 4 *Maucl. & Selw.* 66.  
(d) 2 *Burr.* 1077.

1819.  
  
 SALMON  
 v.  
 WATSON.

tire in itself, and could not be divided; it was a contract for the house and fixtures, and although some of the articles contained in the inventory cannot be strictly termed fixtures, yet they are in effect made so under the contract, as nothing else was to be taken by the defendant. The defendant paid part of the sum for the house and fixtures, on the faith that the agreement would be duly carried into effect. The contract, therefore, as to the house and fixtures, cannot be separated; and although the defendant took possession, still he derived no beneficial occupation, as the plaintiff could make no good title to the house. As, therefore, the letting the house and fixtures were one contract, so the articles as described in the inventory can only be considered as fixtures, and are not divisible from the furniture.

Mr. Serjt. *Taddy*, in support of the rule, was stopped by the Court.

Lord Chief Justice DALLAS was absent,

Mr. Justice PARK.—The declaration in this case contained two counts for goods sold and delivered, and another on an account stated. At the trial I entertained no doubt whatever, but directed a nonsuit on the authority of *Lee v. Risdon*. I have no recollection that the plaintiff endeavoured to support his case on the account stated, although he might have done so, but my attention was drawn to the counts for goods sold and delivered only. There appears to be no little difficulty in separating the articles of furniture from the fixtures, as valued by the brokers in their inventory, still, however, I am now of opinion, that the plaintiff's case may be supported on the account stated. It is therefore unnecessary to consider whether the appraisement were binding, as the inventory was subsequently adopted by the defendant, as well as the valuation made by the brokers. The inventory was delivered to the defendant's wife, and the defendant took pos-

session of the house and fixtures, and raised no objection to the amount of the valuation before the trial, and he is still exercising a dominion over the property. Besides, the defendant was aware that there was no original lease, but still he acquiesced to take the premises, and entered into possession accordingly. Having had, therefore, the actual possession,—having agreed to the amount of the valuation, and adopted the act of the brokers, I am of opinion that the plaintiff is entitled to recover on the account stated between him and the defendant, and consequently, the case of *Lee v. Risdon* will remain untouched by this decision.

1819.  
SALMON  
v.  
WATSON.

Mr. Justice BURROUGH.—It appears that the defendant waived all objections to the title, as he was aware there was no original lease, and consequently that the plaintiff's title was defective; still, however, he entered into possession, and agreed to take the fixtures at a valuation, to the amount of which he made no objection whatever, and as he has had the enjoyment of the fixtures and paid a sum in part for them, I think the plaintiff is entitled to recover on an account stated between him and the defendant.

Mr. Justice RICHARDSON.—I am of opinion that the defendant has waived every objection to the title by taking possession, and as he has also been let into the enjoyment of the fixtures, he is liable to pay the plaintiff for them according to the amount ascertained by the appraisers in their valuation. The count as to the account stated, goes to the whole of that appraisement, and, in point of fact, amounts to the same thing as if such valuation had been made between the original parties; I therefore think that the plaintiff is entitled to recover on that count.

Rule absolute.

1818.

Saturday,  
Nov. 27th,

## WELLS v. GIRLING (a).

*I. S.* was indebted to the plaintiff for money lent, and being embarrassed, the latter informed him that if he would give security for its re-payment, he would procure his creditors to accept a composition. The defendant became surety for *I. S.* in a joint promissory note, and the transaction was to be kept a secret from the other creditors. The plaintiff endeavoured to obtain a composition, but failed: Held, that he could not recover as against the defendant on the note, as the transaction was fraudulent and void in its inception:—Held, also, that if *A.* be indebted to *B.* in £80, and give a promissory note for £87 : 3s. payable by four quarterly instalments (being the amount of principal and interest to the time of the last instalment), and that in case default should be made in payment of any one instalment, the whole sum should become payable; *A.* is entitled to recover the whole of such sum, on default being made in payment of the first instalment, as it was a stipulation between the parties in nature of a penalty, and therefore not a usurious contract or agreement.

THIS was an action of *assumpsit*, brought against the defendant, as one of the makers of a promissory note, of which the following is a copy:—

London, 9th June, 1817.

“ We jointly and severally promise to pay to Mr. John  
 “ *Wells*, or order, the sum of £87 : 3s. in manner following, viz. the sum of £21 : 15s : 9d. on the 29th  
 “ day of *September* now next ensuing; the further sum  
 “ of £21 : 15s : 9d. on the 23th day of *December* next  
 “ ensuing; the further sum of £21 : 15s : 9d. on the  
 “ 23th day of *March*, 1818; and the further sum of  
 “ £21 : 15s : 9d. on the 24th day of *June*, 1818: And  
 “ in case default shall be made in payment of any or  
 “ either of the above sums at the times above limited  
 “ for that purpose, then we jointly and severally promise  
 “ to pay the whole of the said sum of £87 : 3s.  
 “ or so much thereof as shall not have been paid, immediately  
 “ after such default as aforesaid.

“ W. BATH,

“ S. GIRLING.”

At the trial of the cause before Lord Chief Justice *Dallas*, at *Westminster*, at the Sittings in this Term, it appeared, that the circumstances under which the note was given, were as follows:—The plaintiff, a brewer, residing at *Barnes*, in

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(a) See S. C. ante, vol. iii. page 79, as to a variance in setting out one of the instalments in the declaration.

*Surrey*, was in partnership with one *Waring*, and carried on business under the firm of *Waring and Wells*, and on the 11th of *May*, 1816, he lent to *Bath* £80, viz. £20 in cash, and £60 in two checks of £30 each, drawn in the joint names of *Waring and Wells*; that in the early part of the year 1817, *Bath*, who was a publican, became embarrassed, which he communicated to the plaintiff; and that among the debts owing by him at this period, was the above sum of £80 to the plaintiff, as well as the further sum of £98 : 6s : 10d. for beer furnished to him by *Waring and Wells*, and also the further sum of £100 to the plaintiff, for money expended by him in fitting up a house at *Risher*, where *Bath* resided. The latter sum was paid by *Bath* to the plaintiff, who also succeeded in obtaining the defendant's security for the debt of £80, and as an inducement, promised *Bath*, that in the event of that debt being secured, that he would obtain the consent of all the other creditors of *Bath* to take a composition of five shillings in the pound for their debts, alleging, that he had considerable influence over them; on which *Bath* represented to the defendant the advantage it would be to him (*Bath*) to be released from his debts, and after repeated applications to the defendant, he assented to the proposal, and promised to enter into the required securities, and eventually became security to the plaintiff for *Bath's* debt of £80, with interest thereon from *May*, 1816, amounting to £7 : 3s. payable by quarterly instalments, beginning at *Michaelmas*, 1817, and in consequence thereof, signed the note on which this action is brought, at the house of the plaintiff's attorney. After this security had been given, the plaintiff called on some of *Bath's* creditors, and endeavoured to induce them to enter into a composition of five shillings in the pound, which they refused, in consequence of which he desisted from pressing the others. It was further proved by *Bath*, that the circumstances under which the note was made, and the reason of the plaintiff's applying to the other creditors to accept the composition, should be kept a secret from them, as well as his knowledge of the embarrassed circum-

1819.  
  
 WELLS  
 &  
 GIBLING.

1819.  
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 WELLS
 v.
 GIRLING.

stances of *Bath*. In *November*, 1817, being a little more than a month after the first instalment of the note became payable, the plaintiff sued out a commission against *Bath*, founded on the debt due to himself and partner, of £93 : 6s : 10d. and the private debt of £80 due to himself, and for which the above note had been given ;—under which commission *Bath* was declared a bankrupt. The plaintiff proved his debt for £87 : 3s. as due on the note, and *Bath* obtained his certificate, which was dated on the 1st of *November*, 1818. For the defendant it was objected, that the note on which the action was brought was illegal, first, on the ground of usurious contingency, in default of payment of any of the instalments, which was apparent on the face of it, and secondly, that the obtaining the note was a fraud on the part of the plaintiff, as against the other creditors of *Bath*, to whom a composition of five shillings in the pound was to be offered. The Jury, under his Lordship's direction, found a verdict for the plaintiff, but both these objections were reserved for the opinion of the Court.

Mr. Serjt. *Blosset*, on a former day in this Term, obtained a rule *nisi* that this verdict might be set aside and a nonsuit entered, and contended, as to the first point, that as the note was given for £87 : 3s. if the whole of its amount had been paid when the first or any subsequent instalment but the last became due, it would have been a usurious contract, as the whole of the £7 : 3s. for interest could not have been payable until the 24th of *June*, 1818, when the last instalment was due. The note was payable in the alternative, and the interest, therefore, should only have been calculated on the first instalment, whereas the plaintiff proved the whole of the principal and interest under *Bath's* commission, which could not amount to £87 : 3s. unless usurious interest had been charged. He relied on the rules laid down in *Hawkins's Pleas of the Crown* (a), and the dictum of Mr. Justice *Ashhurst* in *Morse*

(a) Vol. 1. c. 82. page 527, et seq., 6th edit. tit. *Usury*.

v. Wilson (a), that "where on the face of the contract itself, the principal was in hazard, as in bottomry bonds, the lender might reserve more than £5 per cent. interest, without incurring the guilt of usury. But that where the principal was secured at all events, and yet more than £5 per cent. might be got by the terms of the contract, it was usurious." That principle is applicable to the present case, as there the interest only amounted to £5 per cent. but the lender was, besides, to receive a certain portion of the profits of the trade of the borrower, and not to participate in the losses. So here, if the instalments had all become due and regularly paid, no more than legal interest would have been taken. Although the note was payable by instalments, the breach of the first could not be considered in the nature of a penalty, nor could the party seek to be relieved in a court of equity. As to the second point, he insisted, that this was, at all events, a fraud on *Bath's* other creditors, and he cited the case of *Cockshott v. Bennett* (b), where it was decided, that if a debtor, on compounding with his creditors, give one of them, unknown to the others, a security for the surplus of his demand, such security is void and voidable only, being in fraud of the other creditors, and incapable of being set up by a subsequent promise.

1819.
WELLS
v.
GIRLING.

The Court were of opinion, that as by the terms of the note the sum was made payable by instalments, if default was made in payment of the first, the whole would become payable, with interest, as stipulated in the instrument; that such stipulation was in the nature of a penalty, to induce the makers to prompt payment of the instalments, and that it was their duty to pay each instalment as it became due, and that although the plaintiff had proved for the whole

(a) 4 Term Rep. 356. — (b) 2 Term Rep. 763.

1819.

WELLS.

v.

GIRLING.

sum under the commission, it made no difference. The rule, therefore, was granted on the second objection only.

Mr. Serjt. *Vaughan* now shewed cause.—The question of fraud was left to the Jury on the former trial, and they negatived it on the merits. The defendant was a surety to secure the sum of £80 lent by the plaintiff to *Bath*, and it was known to all parties that the latter was in insolvent circumstances. The consideration for which the note was given is not illegal, and therefore the defendant cannot impugn it. There would be a wide distinction, if the action had been brought by the plaintiff as *Bath's* assignee, but the transaction, as it now stands, relieves the bankrupt's estate, and is in favor of his creditors. The defendant was a surety for *Bath's* debt, and no fraud whatever was practised on him. Neither were the circumstances under which the note was given, fraudulent as to his creditors, nor were they damnified thereby, as it relieved a proportion of the debt due to them from the bankrupt's estate. The principle laid down in *Cockshott v. Bennett*, and subsequent cases is, that if one creditor enter into an agreement with an insolvent, and obtain a security beyond the terms of the composition submitted to the other creditors, that such security is void, as being fraudulent against the rest of the creditors, who are entitled to receive an equal distribution of his property. But here, no composition was entered into, and therefore those cases do not apply. Even if there had been, the defendant might have been arrested by the plaintiff for the sum originally lent by him to *Bath*, and for which he was security, and the plaintiff might afterwards have prevailed on *Bath's* creditors to sign a deed of composition. The principle laid down in the case of *Wheelwright v. Jackson* (a) is applicable and decisive of the present. There the action was brought by the

(a) 5 Taunt. 109.

1819.

WELLS
v.
GIRLING.

assignees of a bankrupt, and the defendant had two demands on him, one for bills discounted for him, and the other for goods sold; there too, there was an intended deed of composition, but it was not executed, and Lord Chief Justice *Mansfield* founded his judgment on that circumstance, and said (a), that "if the composition had stood, there would not be a doubt that the defendant would have been deemed to have acted fraudulently, and that he could not have held the advantage he had gained." Here, the plaintiff did not intend to defeat the claims of any of *Bath's* creditors under the commission, for his estate was relieved rather than burdened. If the deed of composition had been executed, it might have been considered a fraud on the other creditors, but the defendant cannot say that the note he has given as a surety for *Bath* is fraudulent on the other creditors, although they themselves might do so.

Mr. Serjt. *Blosset*, in support of the rule, submitted, that wherever a person has been party to an agreement, the same objection might be taken as is now raised for the defendant. In cases of gaming, racing, wagers, and usury, the party may always insist on the illegality of the transaction. The case of *Wheelwright v. Jackson* is mainly distinguishable from the present, for if the question there had arose on the original agreement, namely, the proposed composition, it would have been a gross fraud on the other creditors, but that case was decided on a different ground. There, the bankrupt's property was divided among his creditors before the bankruptcy, and the question arose between his assignees and the defendant, who had received securities from the bankrupt, although the bankruptcy was not then in contemplation. Another distinction between this case and that of *Wheelwright v. Jackson*, is, that the action was there brought by the assignees to

(a) 5 Taunt. 116.

1819.

 WEALS
 v.
 GIRLING.

recover the value of securities which the defendant had received from the bankrupt before the bankruptcy, and to which he had as good a title as the assignees themselves, and not for the purpose of enforcing an agreement performed. So here, if *Bath*, or the defendant had paid the amount of the note, it could not be recovered back by the latter. The principle, that *in pari delicto potior est conditio possidentis*, applies as well to this case as that of *Wheelwright v. Jackson*, namely, either to the party giving, or the person to whom the security is given. If, in the latter case, the action had been brought by the defendant against the plaintiff, as assignee of the bankrupt, to enforce an agreement, it is quite clear that such agreement could not be enforced. It is immaterial whether the composition were actually entered into or not, as the transaction was clearly intended to defeat *Bath's* other creditors. His insolvency was known to both the plaintiff and defendant, and the former, who was a principal creditor, said, that if the latter would sign the note in question as a surety for *Bath*, he would endeavour to induce his other creditors to sign a deed of composition for five shillings in the pound. Those creditors were wholly ignorant of this transaction, or that the plaintiff had been paid in full. If they had known that he had obtained this additional security, it is quite clear that they would not have entered into a deed of composition. This, therefore, at first sight appears to be a fraud on *Bath's* other creditors. In *Jackman v. Mitchell* (a) it was held, that a bond to one creditor to secure the deficiency of a composition not communicated to the others, was bad at law as well as in equity, although such a bond, with the privity and consent of the other creditors, might be good. The distinction, therefore, in that case, turned on the communication, and Lord *Eldon* said (b), that "in cases of that description which proceeded on grounds of public policy, the

(a) 13 Ves. 586. — (b) *Ibid.* 587.

relief is given on account, not of the individual, but of the public." Here, the plaintiff endeavoured to get *Bath's* creditors to accept a composition of five shillings in the pound; that, alone, indicates a sufficient intention of fraud on his part; but it has been said, that no composition was effected, and that the defendant intended to secure the debt due from *Bath* to the plaintiff at all events; but the consideration was, that the plaintiff would induce his other creditors to sign the deed of composition, which he has failed in doing. It has been further said, that this was no fraud on *Bath's* creditors, as it tended to increase his estate; but the agreement entered into between him and the plaintiff was, that the latter should be paid his whole demand by the note in question, when he would induce the other creditors to compound. That, therefore, must be highly injurious to them, as the plaintiff was to be paid in full, whilst they were only to receive five shillings in the pound. The plaintiff would not inform them of this circumstance, as the transaction was to be kept wholly concealed from them. Besides, the plaintiff did not press on *Bath* for the payment of his debt, but merely entered into an arrangement with him for its better security. This case, therefore, falls within the principle of former decisions. In *Jackson v. Lomas* (a), Mr. Justice Buller said, that "the general principle is, that a secret agreement of this kind, made between the insolvent and some of the creditors, in order to induce the rest of the creditors to agree to the composition, is void." The same principle was adopted by Lord Ellenborough in *Leicester v. Rose* (b), where he said, that "the question was, whether any legal effect could be given to an agreement by which the plaintiffs, as creditors, were to have a better security for the same sum than the rest of the creditors, after having entered into an agreement with them, importing that the same satisfaction was to be made to all by the

1819.
WELLS
v.
GIRLING.

(a) 4 Term Rep. 170.—(b) 4 East, 380.

1819.


 WELLS
 v.
 GERLING.

same mode of payment." And his Lordship further observed (a), that the principle laid down in all the previous cases was, that "where the creditors in general had bargained for an equality of benefit and mutuality of security, it should not be competent for one of them to secure any partial benefit or security to himself." So Mr. Justice *Lawrence* relied on the dictum of Mr. Justice *Buller* (b). Here, the plaintiff took a private security, intending to benefit himself, and he alone laid the foundation of the transaction for this particular purpose. The same principle is laid down in *Cockshott v. Bennet*, although the agreement there was partly carried into effect—but the agreement itself is altogether void, whether any thing be done under it or not.

Lord Chief Justice DALLAS.—In this case the first question which arises is, whether this agreement was fraudulent in its creation. That depends on the facts, and first, as to the intention of the parties; the plaintiff was a creditor of *Bath*, who, before his bankruptcy, had dealings with the plaintiff and *Waring*, who were in partnership as brewers, and who supplied *Bath*, a publican, with beer from their brewery. *Bath* was also indebted to the plaintiff in the sum of £100 for furniture, which was paid off, and in the further sum of £80, on account of cash lent him by the plaintiff alone. *Bath* became embarrassed, of which the plaintiff had full knowledge, and the defendant, at the time he signed the note, was also aware of *Bath's* being in insolvent circumstances. The plaintiff then proposed that *Bath* should give him a security for the £80 advanced by him, and he would then endeavour to induce his creditors to enter into a composition to accept five shillings in the pound, and that he would apply to them for that purpose. Under these circumstances, the defendant was applied to by *Bath*, and became surety for

(a) 4 *East*, 381. — (b) *Id.* 383.

him by signing the note in question, on the express undertaking that the plaintiff should get the deed of composition executed by *Bath's* other creditors, and that the transaction should be treated as private, and concealed from them. Under this secret agreement the parties proceeded, and the plaintiff endeavoured to get the deed of composition executed, but did not succeed. A commission was then sued out against *Bath*, in which the plaintiff was the petitioning creditor, and proved the full amount of the note in question under the commission. The plaintiff, therefore, stipulated that *Bath's* other creditors should execute a deed of composition after he had signed it, in order that his signature should operate as an inducement to them to sign also, they being wholly ignorant of his having derived any other benefit than what was to be obtained from the deed, and by sharing the property of *Bath* equally with him, whereas he had secured *Bath's* debt to him, which was to be paid in full under the note in question. This agreement, therefore, was void in its creation on the ground of fraud, and if it were void in its inception, it cannot cease to be so on account of events which have happened afterwards. It has, however, been most strenuously objected, that the plaintiff is entitled to recover, as the deed of composition was not carried into effect. Still, however, the transaction was fraudulent *ab initio*. The plaintiff was the principal party to it, and now seeks to recover through the instrumentality of the note on which the present action is brought. Independently of the judgment of this Court in the case of *Wheelwright v. Jackson*, I should be quite clear that the plaintiff cannot be entitled to recover,—but if on looking into that decision, I should discover any grounds to alter my opinion, this case shall be again mentioned.

1819.

 WELLS
 v.
 GIBBINS.

Mr. Justice PARK.—When this motion was first made, I entertained no doubt whatever as to its result. Unless the cases of *Cockshott v. Bennett*, *Leicester v. Rose*, the de-

1819.
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 WELLS  
 v.  
 GIRLING.

cision in which was afterwards recognised in the House of Lords, and *Jackman v. Mitchell*, are overturned, the promissory note in question cannot stand. It was void in its creation, and cannot become valid by any subsequent circumstances, although the undertaking by the plaintiff to obtain the deed of composition from *Bath's* other creditors, did not succeed. The case of *Wheelwright v. Jackson* has now come before the Court for the first time since it was decided, and the expressions and reasoning adopted by my Lord Chief Justice *Mansfield* in delivering the judgment of the Court there, have raised the only doubt in my mind. I shall, therefore, wish to consider it, although I think it quite distinguishable from the present. The action there was not brought to enforce the contract, but quite the reverse. If the defendant in this case had paid the money, the rule *in pari delicto potior est conditio possidentis* would clearly apply, and he could not have recovered it back. At present, however, I am of opinion that a nonsuit must be entered.

Mr. Justice BURROUGH.—This case must be governed by the principle laid down in that of *Cockshott v. Bennett* and the subsequent decisions that have been adverted to by my Lord Chief Justice. *Bath* was indebted to the plaintiff for money lent. They entered into a secret agreement as to the mode of re-payment by the former. The defendant then became surety to pay *Bath's* debt, and entered into a joint note with him to the plaintiff to pay the principal, with interest; on which the latter undertook to obtain a deed of composition from *Bath's* other creditors. This clearly amounted to a fraudulent preference given by *Bath* to the plaintiff. There can be no doubt if the action had been brought against *Bath*, it could not have been sustained, and the defendant, as his surety, must stand in the same situation. The transaction was void in its inception, and so was the note the moment the defendant had attached his signature to it.

Mr. Justice RICHARDSON.—The consideration for which the note was given was illegal and fraudulent. I therefore am of opinion that this action cannot be supported. From *Cockshott v. Bennett* to the latest decision on this subject, the principle has been established, that if a creditor obtains a security from his debtor by a secret contrivance of which the other creditors are ignorant, it is a fraudulent preference within the meaning of the bankrupt laws. Here the plaintiff, a favoured creditor, obtained a secret advantage by the note in question. It appears to me that this case is very distinguishable from that of *Wheelwright v. Jackson*, where the bankrupt delivered bills of exchange to the defendant, but the bankruptcy at that time was not even contemplated, although it happened four months afterwards, and the Court said, that they could not assist the assignees to recover the value of those bills in an action of trover, as there was, in point of fact, no fraud, and as the contract was executed. If the defendant in this case had paid the money, I do not think he would be entitled to recover it back, but so long as it remains unpaid, the plaintiff cannot recover from him; besides, the latter does not come into Court with clean hands, and I therefore am of opinion that a nonsuit must be entered.

Lord Chief Justice DALLAS then stated that he had looked into the case of *Wheelwright v. Jackson*, and that his doubts were removed;—that the facts here amounted to a fraudulent preference, as the plaintiff promised to obtain the deed of composition, and actually applied to several of *Bath's* creditors for that purpose after the note was given.

Mr. Justice PARK concurring, the rule to enter a nonsuit was made

Absolute.

1819.

WELLS  
v.  
GIRLING.



1819.

Saturday,  
Nov. 27th.

## JOHNSTON v. BENSON.

Goods were shipped by the plaintiff in London, to be conveyed by the defendant, as ship owner, to Jamaica. The goods were there sent on shore according to the custom of the West India trade, in a shallop belonging to the defendant's ship, and lost by perils of the sea. The clause of exception in the bill of lading was in the following terms: "the act of God, &c. and all and every other dangers and accidents of the seas, rivers, and navigation, of whatever nature and kind soever, *save risk of boats, so far as ships are liable thereto, excepted*:"—Held, that the defendant was not liable for such loss under the bill of lading, as the saving clause only extended to the same risks as if the goods had been on board the ship.

THIS was an action of *assumpsit*, brought to recover from the defendant, as owner of the ship *Fortitude*, the value of five boxes, containing merchandize shipped by the plaintiff on board that ship, to be conveyed from the river *Thames* to *Buff Bay*, in the island of *Jamaica*. The first count of the declaration stated, that the defendant was the owner of the ship, then in the river *Thames*, and bound from thence for *Buff Bay*; that thereupon, in consideration that the plaintiff, at the request of the defendant, had caused to be shipped on board the said ship of the defendant, five boxes, containing merchandize of the plaintiff of the value of £200, on account and risk of the plaintiff, then in good order and well-conditioned, to be by the defendant, for certain freight and hire, safely and securely carried from the river *Thames* to *Buff Bay*, and there to be delivered in like good order and condition (the act of God, the King's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of whatever nature and kind soever, *save risk of boats, so far as ships are liable thereto*, excepted) to the plaintiff or his assigns, the defendant undertook safely and securely to carry and convey the said five boxes of merchandize from *London* to *Buff Bay*, and there deliver the same, subject to the above exception. The plaintiff then averred, that although the defendant received the boxes for the purpose aforesaid, and that though a reasonable time for the delivery of the same had long since elapsed, assigned for breach, that the defendant did not safely and securely carry the same from *London* to *Buff Bay*, nor there deliver them in good order and well-conditioned, to the plaintiff or his assigns, although no act of God, nor of the King's enemies, nor fire, nor any other dangers or accidents of the seas, rivers, or na-

vigation of any nature or kind soever, happened to prevent the same from being delivered, but that, on the contrary thereof, the defendant so negligently conducted himself in and about the conveying of the said boxes of merchandize, that they became and were wholly lost, spoiled, and of no value to the plaintiff. The second count stated, that the defendant promised the plaintiff that the ship *Fortitude*, then lying in the river *Thames*, was bound to *Buff Bay*, and that the plaintiff, in consequence, shipped the goods on board thereof, and assigned for breach, that the ship was not bound to *Buff Bay*, but to some other port in *Jamaica*. To these were added the common money counts; and the defendant pleaded *non assumptit*.

1819.  
JOHNSTON  
v.  
BENSON.

At the trial of the cause before Lord Chief Justice *Dallas*, at *Guildhall*, at the last Sittings in this Term, the plaintiff proved the shipment of the goods in question, to be delivered to his consignees at *Buff Bay*, the ownership of the vessel by the defendant, and the non-delivery of the goods. The bill of lading was signed by the master of the ship, and the exception was in the following terms:—"The act of God, the King's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of whatever nature and kind soever, save risk of boats, so far as ships are liable thereto, excepted." For the defendant it was proved, by a protest of the captain and two of the crew, that on the 31st of *January* last, the *Fortitude* arrived from *London* at *Anatto Bay*, in the island of *Jamaica*, which is to the westward of *Buff Bay*, and beyond it; that the master there proceeded to deliver her outward-bound cargo, until the 6th of *March* following, on the evening of which day, the weather being then fine, he sent a large boat or shallop of the *Fortitude*, which was partly decked and coppered, with four seamen, from the ship, with the goods in question, to be delivered at *Buff Bay*; that about half-past nine the same evening, the shallop anchored in *Buff Bay*, with two anchors

1819.  
JOHNSTON  
v.  
BENSON.

and two chain cables; that between eleven and twelve, a heavy swell of the sea set into the bay, and the wind blew strong from N. N. W. attended with a great increase of sea; and that about half-past two on the following morning, the shallop drove from her anchors, and struck on the piles of a wharf, and was almost instantly dashed to pieces on the shore; and that the goods in question, which were then on board her, were either lost, or so much damaged as to be sold at a public sale for a small sum of money. It was also proved, that it was the usual course of the *Jamaica* trade for ships not to go to *Buff Bay*, but that goods were delivered there in a sort of boat called droggers, and that the conduct of the master on the voyage in question was perfectly conformable to the usual custom of such trade. On these facts the Jury found a verdict for the defendant; but his Lordship gave the plaintiff leave to move to set it aside, and have it entered for him for £82, being the value of the goods in question, on an objection raised as to the liability of the defendant to risk in boats, by the exception in the bill of lading, and whether the loss was or was not within the terms of that exception.

Mr. Serjt. *Taddy* having, on a former day, obtained a rule *nisi* to that effect, observed, that as the Jury had found that the delivery was intended to be made according to the usual course of the *West India* trade, the only question arose on the construction of the exception contained in the bill of lading, namely, "save risk of boats so far as ships are liable thereto." He cited *Abbott on Shipping* (a), where it is stated, that in the old form of bills of lading, the only exception was, "the dangers of the sea," but that in the case of ships homeward bound from the *West India* islands, which send their boats to fetch their cargo from the shore,

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(a) 4th edit. 225, 6.

there is introduced a saving out of this exception of risk of boats, so far as ships are liable thereto. The object of the introduction of these latter words was, to make ship owners liable for the safe delivery of goods out of boats, as well as out of ships, and not to enlarge the risk of the shipper. The defendant, as owner of the vessel, therefore, must be considered as liable for risk incurred in boats, as though such goods had remained on board the vessel. He also cited the case of *Smith v. Shepherd* (a).

1819.  
JOHNSTON  
v.  
BENSON.

Mr. Serjt. *Lens* now shewed cause, and contended, that although the language of the bill of lading was in itself ambiguous and obscure, still the object evidently was, that while the goods in question were in the shallop, they were to be liable to the same risk as if they had remained on board the ship, but to no more. The liability of the ship owner, as to the loss of the goods, continues on risks incurred in boats equally as for those incurred in ships. Here, therefore, the defendant's liability could not extend to a loss arising from the perils of the sea, whether that loss arose either from the wreck of the ship or the shallop. This is apparent, as well from the reason of the thing, as the legal effect of the exception, the express object of which was to protect the ship owner, so as to render him only liable for the same species of risk in boats as he would have been liable to in ships.

Mr. Serjt. *Taddy*, in support of the rule.—No case has occurred where this question has been before raised, and it is inconsistent to suppose that the meaning of the exception in the bill of lading can be extended to boats as well as to ships; for if it had been so meant, the words "save risk of boats, so far as ships are liable thereto," should have been

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(a) *Abbott on Shipping*, 4th edit. 263, a.

1819.

JOHNSTON  
v.  
BENSON.

altogether excluded, as if they could be construed as an addition to the exception, rather than as a saving from it, that construction would be entirely opposed to the terms of the exception. If the goods were only to be deemed liable to the same risk in boats as if they had remained on board, the language of the bill of lading would have been, that all dangers, &c. should be excepted, whether in ships or in boats, so as to have put them both on an equal footing. But it is quite clear from the language of the exception, that a liability is incurred for goods in boats, separate from that which attaches while they remain in ships. Formerly, the exception only extended to the dangers of the seas, but the terms of that exception were altered in consequence of an alarm taken by ship owners, on the decision of *Smith v. Shepherd*, since which, the exception has been usually made in the following words, "the act of God, the King's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of whatever nature and kind soever, excepted." This, therefore, extended to protect the ship owner from losses in rivers as well as at sea. If the exception had so stood in the present case, the plaintiff could not have established his claim, but as the voyage in question was to one of the *West India* islands, where, by the course of the trade, the ship owner or master sends boats or droggers to take or fetch the cargo to or from the shore, the saving was introduced out of this exception "of risk of boats, so far as ships are liable thereto." As the exception formerly stood, ship owners could not be responsible for any risk at all in boats, and the saving was therefore introduced to render them liable to all the risks occurring to goods conveyed in boats, as well as those perils to which ships themselves are usually exposed. If the saving were to be construed as the defendant insists it must be, the rights of the parties would remain precisely the same as if it had not been introduced. But the saving of risk of boats out of the general exception of dangers of the seas, must mean, that boats are still to

be held liable to dangers of the seas, and that the words following, "so far as ships are liable thereto," can only be understood to imply the liability of ships, independently of the exception. In *Nesbitt v. Lushington* (a), the underwriters provided, by a memorandum at the bottom of the policy, that they would not be liable for any average, unless general, or the ship were stranded. If therefore a ship is stranded, a greater responsibility attaches to them, as they agree to ascribe the loss to the stranding, as being the most probable occasion of the damage. By the introduction of the words, "save risk of boats," the effect is to take them out of the exception, although the defendant has contended that such introduction is wholly immaterial. In *Burnett v. Kensington* (b), the question arose on the exception to the usual memorandum, "or the ship should be stranded;" that, therefore, was a saving out of an exception, for the underwriters would not have been liable if the loss had been under four *per cent.* unless the average had been general, or the ship stranded. That saving could not over-ride the exception, nor can it in this case; and Lord *Kenyon* there said (c), that "if a general provision be made in any deed or instrument, and it is there said that certain things shall be excepted unless another thing happen which gives effect to the general operation of the deed, if that other thing does happen it destroys the exception altogether." According, therefore, to the legal and grammatical construction of the present bill of lading, the word "thereto" must refer to its last antecedent, which is, "all dangers and accidents of the seas, rivers, and navigation."

1819.  
JOHNSTON  
v.  
BENSON.

Lord Chief Justice DALLAS.—Both the saving and exception are imperfectly worded, and they have introduced an obscurity into the instrument, which has given rise to the

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(a) 4 Term Rep. 783.—(b) 7 Term Rep. 210.—(c) *Id.* 221.

1819.

JOHNSTON  
v.  
BENSON.

question now before the Court, namely, as to the legal and grammatical construction of the bill of lading. My Brother *Lens* appears to have founded his argument on the reason of the thing, which was apparent on the face of the instrument. If on reading the bill of lading, there could be but one construction put on it, such reason would be sufficient. It is said, in *Abbott on Shipping* (a), that the terms of the exception, as they stood in the old form of a bill of lading, were altered in consequence of an alarm taken by the ship owners, on the decision of *Smith v. Shepherd*, and that from that time other exceptions have been introduced in favour of such owners, to limit their responsibility. If, therefore, the exception in the bill of lading in this case stood as it did in the old form, no distinction could be drawn between ships and boats; and if goods be lost by the destruction of the boat, the liability of the ship owner can be extended no further, than if the loss had taken place on board the ship. Here, however, there is a saving, namely, "save risk of boats, so far as ships are liable thereto." These words, I think, were intended to place the liability of the ship owner, with regard to the shipper of goods, to risks in boats as it stood with regard to ships. Now, it is clear, if this loss had arisen on board the ship, that the defendant would not have been liable, as it originated from the perils of the sea; and it cannot be inferred, that as the goods in question were stowed in a boat or drogger, by the usual custom of the *West India* trade, that he should be deemed responsible, when he would not have been so had they remained on board the ship. To render him liable, it must be contended, that the moment the goods were taken from the ship, and deposited in the boat, the ship owner must be liable to the loss, although he would not be, if they had remained on board the ship. It is unnecessary to say how far the liability of the ship owner to risks in

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(a) Page 226.

boats may extend, but merely to observe that the boat in which the goods were conveyed, was lost by the dangers of the sea, and that had such loss originated on board the ship, the defendant would not have been liable. On the fair construction of this saving, the liability of ship owners may in some instances attach for losses in boats, but cannot do so in this case, as the loss in question arose from the dangers of the sea. I therefore think that the defendant is entitled to retain his verdict.

1819.  
JOHNSTON  
v.  
BANKSON.

Mr. Justice PARK.—I am of the same opinion. The instrument is drawn in a very bungling manner, but still it is sufficiently clear to shew that the intention was not to render owners of ships on the *West India* trade liable to losses in boats arising from the perils of the sea, but merely to make them responsible to the same risks as those which would attach to them in ships.

Mr. Justice BURROUGH.—This seems to me to be a plain case. The words of the saving appear to be words of caution, and in point of strictness are perhaps unnecessary. In *Pelly v. The Royal Exchange Assurance (a)*, where an *East India* ship staid at *Canton* to clean and refit, for which purpose all the sails and furniture were taken out of the ship, and put on a sand bank in the river there, where they were accidentally burnt; it was held to be a loss within the meaning of the policy, against the perils of the sea and fire, as it was found to be the well-known and established usage, and to be prudent, and for the general benefit of the insurers and all concerned. By transposing this saving, the exception might be perfectly plain. If the exception were to be read, that the act of God, &c. and all dangers of the seas, &c. were to be excepted, save risk of boats, so far as ships are liable

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(a) 1 Burr. 341.



1819.

JOHNSTON  
v.  
BENSON.

thereto, it would be quite clear that the ship owners would only be liable to such risks in boats as they would be liable to in ships. But if it had been intended they should be liable for such risks incurred in boats at all events, the words "at all times, and in all cases," or words to that effect, would have been obviously adopted. But the risk expressly saved out of the exception, is merely the risk of boats, so far as ships are liable to such risks; and it is quite clear that ship owners are not responsible for the loss of goods by perils or dangers of the sea. This verdict, therefore, cannot be disturbed.

Mr. Justice RICHARDSON.—The words of the exception, and the saving clause in this bill of lading, are not only imperfect in themselves, but convey an obscure meaning; however they do not extend the liability of the ship owner further than its original limits. His responsibility to risks in boats is restricted to his liability to risks in ships, and such restriction is confined by the express words of the saving, namely, "so far as ships are liable thereto." The saving, therefore, does not except boats altogether, but has the effect of leaving the responsibility of the ship owner, with respect to boats, in precisely the same situation as he previously stood with regard to ships. I, therefore, concur with the Court in opinion, and this rule must consequently be

Discharged,

1819.



## BENDYSHE v. PEARCE.

Monday,  
Nov. 29th.

THIS was an action of replevin for distraining the plaintiff's corn and goods. The defendant made cognizance, first, as bailiff of the Master, Fellows, and Scholars of *Trinity College, Cambridge*, stating an act of Parliament passed in the 36 Geo. 3. (a) for dividing and allotting commonable lands in the parish of *Barrington*, in the county of *Cambridge*, which enacted (among other things) that all the tithes within the parish were to be abolished, and an adequate compensation made to the Master, Scholars, and Fellows, in the manner stated in that act, viz. the Commissioners were to value all the lands to be divided and allotted (except the rectorial and vicarial glebe lands) at the rate of four shillings per acre. They were also, in the manner directed by the act, to ascertain the average price of good marketable wheat, in the markets of *Cambridge* and *Royston*, during twenty-one years next preceding *Michaelmas*, 1794, and by their award thereafter directed to be made, ascertain and set forth what quantity of such wheat should, in their judgment, according to such average price, be equal in value to a sum set on all the lands in the parish liable to the payment of tithes, at the rate of four shillings an acre; and that after the expiration of the then subsisting lease of the said tithes, there should be a sum issuing out of the lands, and payable to the said Master, Fellows, and Scholars, equal to the value of such quantity of wheat, so to be ascertained as aforesaid; and that the said yearly corn rents should be paid in

By an enclosure act, referees were appointed to ascertain the average price of corn in the week after the close of *Easter* next after the expiration of fourteen years after the division and allotments under the enclosure should be finished, and the exact amount of a yearly corn rent, in lieu of tithes, was to be declared by an order of the Quarter Sessions. The referees delivered their report into the Court of Quarter Sessions, who ordered it to be filed:—Held, that this was not an order as required by the act, declaring the exact amount of the yearly corn rent, in the manner therein directed:—Held also, that the Commissioners under the act having made minutes

(a) c. 61.

of their proceedings in writing, no parol evidence could be admitted, to shew when the division and allotments were made and completed, as such minutes were neither produced, nor proved to have been destroyed.

The allotments were made and finished in *September*, 1799, and the Commissioners made their award on the 20th of *October*, 1800, and application was made at the *Easter* Sessions, 1814.—*Quære*, Whether this was premature within the meaning of the act?

1819.  
  
 BENDYSHE  
 v.  
 PEARCE.

the proportions expressed in the award, by the possessing occupier of the respective lands out of which the same should be issuing. This sum was not to exceed £85 *per annum*, nor be less than £80. The act then provided that the impropiators, or any one or more of the owners or proprietors, assessed to the poor's rate at £40, by writing under their hands, *to apply* at the first Quarter Session of the Peace for the county of *Cambridge*, to be held in the week after the close of *Easter* next after the expiration of fourteen years after the said division and allotments should be made and finished, after notice given of such intended application, in the *London Gazette*, and also in some newspaper usually circulated in the county of *Cambridge*, on the first day of publication, in the month of *January* next preceding, to have two persons named by the Justices, which two persons were to name a third; and these three, as arbitrators or referees, were to ascertain, in the manner mentioned in the cognizance, the average price of a good marketable *Winchester* bushel of wheat in the county of *Cambridge*, for fourteen years then past. These three arbitrators were to report to the Sessions to be holden in the first week after the Translation of *St. Thomas* the Martyr, whereon they were to set forth such average price. And if it should appear by such report, that such average price should be more or less than the average price set forth in the award, by the value of three pence or upwards, then the said yearly corn rent, or sum arising from the said four shillings *per statute acre*, was to be increased or diminished in proportion; and the exact amount of the said yearly corn rent, or sum to which it should be increased or diminished, should be declared by order of the said Court. The Commissioners, as soon as they had completed the allotments, were to make their award or instrument in writing, and the several allotments, exchanges, partitions, divisions, orders, and directions to be made by them, in and by such award or instrument, were to be final, binding, and conclusive, on all and every the parties

interested. The defendant then averred, that after passing the act, and the determination of the said lease of the great or rectorial tithes, to wit, on the 20th *October*, 1800, the Commissioners valued all the commonable lands, &c. at four shillings *per* statute acre, and duly ascertained the average price of wheat as directed by the act; and that afterwards, to wit, on the day last aforesaid, they did complete and finish the partitions and allotments, pursuant to the purport and directions of the said act; and did, in pursuance of the powers and authorities vested in them by the act, form and draw up an award or instrument in writing, in which they ascertained and distinctly set forth what quantity of such wheat was, in their judgment, equal in value to the payment of tithes, at the rate of four shillings *per* acre, and in which award the Commissioners allotted to the plaintiff certain lands, and charged the same with the annual sum of £49.

17s. 5d. by way of corn rent, in lieu of the said rectorial tithes. And that *afterwards*, and *after notice duly given* in that behalf, application was made at the Quarter Sessions holden in the week after the close of *Easter* next after the expiration of fourteen years, after the said division and allotment were made and finished, to wit, on the 22d *April*, 1814, to have two persons appointed by the Justices, who *were duly appointed*, and named a third; and that on the 15th of *July* following, they reported and delivered their report to the Quarter Sessions held in the first week after the Feast of the Translation of *St. Thomas* the Martyr, next ensuing the said first Sessions; and it appeared by such report, that the average price of a bushel of such wheat was more than the average price set forth in the award, by the value of three pence and upwards; and that it was declared by the order of the said Court of Sessions, that the said yearly corn rent, or sum of £49. 17s. 5d. which had been ascertained by the Commissioners, and charged by their award, should be increased to £101. 9s. 7½d. and that, on the 23th *March*, 1816, that sum became due to the Master, Fellows, and Scholars,

1819.

BENDYSHE  
v.  
PEARCE.

1819.

BENDYSHER  
v.  
PEARCE.

by virtue of the said act, award, and order of the Justices, and was in arrear for one year, for and in respect of the said allotments, whereof the close and yard in the declaration were parcel, and so the defendant acknowledged the taking the distress, and alleged the plaintiff to be in possession of the allotment, in respect of which it was payable. The second cognizance was in effect similar to the first, but averred that *John Souther* was in possession of the said allotments, whereof the said close, &c. were parcel. The defendant then avowed, as lessee of the corn rent ascertained by the award, that it was increased by the report and order of Sessions, &c. to £101. 9s. 7½d. on the premises in possession of the plaintiff. There was another avowry, in similar terms, only alleging the possession of the premises to be in *John Souther*.

The plaintiff, by his first plea in bar, denied that notice was given as alleged in the first cognizance, of the application to the Quarter Sessions for the purposes and at the time therein mentioned. The second denied that application was made at the first Quarter Sessions after the close of *Easter*, next after fourteen years after the said division and allotment, &c. The third denied that two persons were named as alleged. The fourth asserted that it was not declared by any Quarter Sessions, that the said yearly corn rent of £49. 17s. 5d. should be increased to £101. 9s. 7½d. The fifth declared, that no part of the said sum of £101. 9s. 7½d. became due by virtue of the said act, and of the said award and order of the Justices, or either of them. The last averred, that neither the plaintiff nor *John Souther* were in possession of the allotments at the time at which, &c.

On these pleas issue was joined. At the trial of the cause before Mr. Baron *Graham*, at the Spring Assizes at *Cambridge*, 1817, a verdict was taken for the defendant on all the issues, with £101. 9s. 7½d. damages, subject to the opinion

of this Court, on a case of which the following is the substance, and of which the enclosure act in question was to be considered as a part.

1819.  
BENDISH  
v.  
PEARCE.

The defendant was lessee of the corn rents, under *Trinity College*, and in order to establish the affirmative of the first issue, he proved, that he published in the *London Gazette*, of the 1st of *January*, 1814, and also in the *Cambridge Chronicle* of the 7th of that month (being the newspaper usually circulated in the county of *Cambridge*, and the first day of publication in that month), a notice to the proprietors and occupiers of land in the parish of *Barrington*, that he should apply to the Quarter Sessions to be held at *Cambridge*, in the week next after the close of *Easter*, to request the Justices there to appoint arbitrators to determine the average price of corn during the last fourteen years, in order to fix the just corn rents for the tithes in that parish for the next fourteen years, as directed by the 36 *Geo. 3. c. 61*. The award was made by the Commissioners, on the 20th of *October*, 1800, according to the provision contained in the thirtieth page of the act (a); but the defendant contended, that the division and allotments were made and finished according to the provisions contained in the fifteenth page of the act (b),

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(a) Whereby it is enacted, that the Commissioners should, as soon as conveniently might be after they should have completed the divisions and allotments of the commonable lands, draw up an award or instrument in writing, expressing the quantity of lands to be divided and allotted.

(b) By which it is enacted, that it should be lawful for the impropriators and owners assessed to the poor's rate at £40 or upwards, by writing under their respective hands, to apply at the first Quarter Sessions of the Peace to be held for the county of *Cambridge*, in the week after the close of the Feast of *Easter*, next after the expiration of fourteen years after the division and allotments should be made and finished, to have two persons named or appointed by the Justices there assembled, to be, together with a third person, chosen arbitrators, or referees, to ascertain the average price of corn, and set forth such average price by their report to be made and delivered to the Court of Quarter Sessions, to be

1819.  
BENDYSHE  
v.  
PEARCE.

in *September*, 1799, and consequently that the notica and application to the Quarter Sessions, mentioned in the pleadings, were made in due time. The minutes of the proceedings of the Commissioners were left in the custody of one of them, who is since dead. They were not produced by the defendant, nor was any evidence given of any search or enquiry for such minutes at the house, or amongst the papers of such Commissioner, before or since his death, nor was any proof given of the minutes being destroyed. But, in order to prove that the division and allotments were made and finished in or about the Summer of 1799, the defendant proved, that a certain parchment which was produced, under the hands of the Commissioners, was affixed to the church-door of *Barrington*, about the month of *September*, 1799. This parchment purported to be a rate for the expences of the enclosure, made on the 7th of *August*, 1799. It was also proved, by a witness who kept private notes of what was done by the Commissioners, that the allotments were finished in the Spring of 1799; but he admitted, that alterations were made in the Summer of that year, and in particular, that a road was set out over the plaintiff's allotment in that Summer. On the second and third issues, the defendant proved that an attorney employed by him gave a brief to counsel at the *Easter* Sessions, 1814, with instructions to make a motion, and which motion paper was signed by the counsel, and he proved by the proceedings of the Quarter Sessions, that such motion was made, ordering two referees to be appointed for ascertaining the corn rents in the parish of *Barrington*; and in order to maintain the fourth issue,

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held in the first week after the Feast of the Translation of *St. Thomas* the Martyr, then next ensuing, and that the exact amount of the yearly corn rent, or sum of money, to which the same should be so increased or diminished, should be declared by the order of the said Court, and should remain and continue issuing out of the several allotments charged by the said award with the said yearly corn rent, or sum of money.

the defendant put in the proceedings of the Sessions, and the report of the referees appointed by the Justices. This report was delivered into Court, and the Justices ordered the same to be filed. The clerk of the peace, in answer to enquiries made of him, stated, that the application was made to the Sessions on a common motion paper, handed to a barrister by the attorney on behalf of *Trinity College*, and that no other order appeared to have been made than that "*the report be filed.*" On the fifth and last issues it was proved, in addition to the above evidence, that *Souther* occupied and cultivated the *locus in quo* from *Lady-day*, 1814, to *Lady-day*, 1815, and paid the increased corn rent of £101. 9s. 7½d. and that at the latter period the occupation was given up by him to the plaintiff.

1819.

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BENDYSHE  
v.  
PEARCE.

The questions for the opinion of the Court were :—First, Whether the notice and application to the Quarter Sessions were in due time? Secondly, Whether the notice and application were good according to the provisions of the fifteenth page of the act? Thirdly, Whether there was any legal evidence given of the division and allotments being made and finished in any other mode, or at any other period than in and by the execution of the award? And lastly, Whether the order of the Quarter Sessions for filing the report of the referees was such an order as was required by the fifteenth page of the act declaring the amount of the yearly corn rent in the manner therein directed?

The cause came on for argument on a former day in this Term, when Mr. Serjt. *Frere*, for the plaintiff, objected, first, that the application to the Quarter Sessions was not made in due time, according to the provision contained in the fifteenth page of the act, for it could not be made until fourteen years from *Easter*, 1801, whereas it is dated from the award which was made in *October*, 1800, and which was therefore clearly premature. Secondly, That the notice and application were not good, because, by the fourteenth page



1819.  
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 BENDYSHE
 v.
 PEARCE.

of the act, the impropiators, and *their successors*, might apply at the first Quarter Sessions after *Easter*, next after the expiration of fourteen years after the division should have been completed; neither does it appear that the defendant was authorised by the impropiators to represent them, or that the application was made in writing, under their hands, as required by the act; but, on the other hand, it was a mere oral application, as counsel were only instructed to move for referees to be appointed. Thirdly, there was no legal evidence adduced at the trial of any previous proceedings of the Commissioners having made and finished the division and allotments. It is clear, they kept minutes of their proceedings, and equally so that they should either have been produced or accounted for. Parol evidence of such proceedings was not admissible, unless it were proved that the minutes were not in existence, The notice on the church-door was merely evidence of the rate, but not that the division and allotments had been made or set out, for that could only have been proved by the production of the minutes. Lastly, The order of the Quarter Sessions was not an original or effectual order declaring the amount of the corn rent, but merely an order that the report of the referees should be filed, and consequently there is no order whatever as to the amount of the corn rent, which should have been declared by the order of the Court of Quarter Sessions.

Mr. Serjt. *Blosset*, *contra*.—As to whether the notice and application were in due time, or made within the provisions of the act, it has been objected that it did not appear that the application was made in writing under the hands of the impropiators, or that the defendant was authorised by them to make it; but that does not apply to the impropiators, who are a body corporate, and consequently not to the defendant as their lessee. Besides, the rectory was capable of being demised by deed, and was so demised to the defendant, and he then became impropiator during the

lease, and was invested during the term with all the rights of his lessors, and the notice was in writing. The year in which the notice was to be given was either directory or in case of the party,—and if it were not given in due time, it might afterwards be so, and the notice to the parties to be affected is in itself perfectly correct. The finishing the allotments and making the award are two distinct things; the first is a mere matter *in pais*, and it was proved that they were completed in the Spring of 1799, although a road was afterwards set out over the plaintiff's allotment. The minutes or order of the Commissioners need not have been in writing; at all events they could only have afforded evidence of their own contents as to dividing the allotments, and not conclude the question when they were finished. There was, therefore, sufficient legal evidence to shew that the allotments were completed in 1799, as they were proved to have been made by an eye witness. Besides, the Commissioners made a rate in writing, under their hands, for the expences of allotting and dividing the lands. The award itself supersedes the necessity of the production of those minutes. As to the order of the Quarter Sessions, it is quite sufficient, the report was referred to the magistrates, and presented at the sessions, when the Court ordered it to be filed. By so doing, they adopted the report of the referees, and on its being filed it became incorporated with the other orders of that Court. The case of *The King v. The Justices of Glamorganshire* (a) is stronger than the present, where it was held, that if justices at sessions confirm the act of a committee nominated by them, it becomes their own. There, there was no contract in the first instance, but what is tantamount to it, is in fact, a contract.

Mr. Serjt. *Frere* in reply.—No evidence of the proceedings by the Commissioners before the allotments were com-

1819.
BENDYSH
v.
PEARCE.

(a) 5 Term Rep. 279.

1819.
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 BENDYSHE  
 v.  
 PEARCE.

pleted was admissible at the trial, but their minutes ;—which were neither produced or accounted for :—and it appeared that such minutes were in writing and in existence, and the witness himself allowed that alterations had been made since such allotments were finished. Although the order of the Quarter Sessions might have been made in time, still the Justices did not declare the amount of the corn rent by that order, but merely ordered the report of the referees to be filed—and by so doing they did not make it an original order of sessions. The case of *The King v. The Justices of Glamorganshire* is inapplicable to the present, as there the Justices had previously delegated their authority, and afterwards confirmed it, while here there was no delegation whatever.

*Cur. adv. vult.*

On this day Lord Chief Justice DALLAS delivered the following judgment:—At the trial of this cause a special case was reserved for the opinion of this Court, at the foot of which four questions were put. It is, however, unnecessary for us to do more than give our opinion on the third and fourth. Indeed, the fourth alone, is decisive of the cause, but we think it right to declare our opinion on the third also. To consider the fourth, however, in the first place, which is, whether the order of the Quarter Sessions for filing the report of the referees is such an order as is required by the act declaring the amount of the yearly corn rent in the manner therein directed? The act directs that the referees shall make their report to the Quarter Sessions, and that the exact amount of the said yearly corn rent or sum to which it should be increased or diminished, should be declared by the order of the said Court. The case states that the referees made their report, by which it appeared that the corn rent was increased to the sum for which the distress was taken. But it appears as a fact on the case reserved, that all the sessions did was to order that the report be filed. There is nothing equivocal in

this order. It is a simple direction, that the report be placed on the files of the Court. We cannot construe this to be an order declaring the exact amount to which the rent was to be increased. The Court of Quarter Sessions does not appear to have exercised any jurisdiction or judgment on the subject; they have barely received and filed the report. On this issue, therefore, we think the plaintiff entitled to judgment. The third question is, whether there was any legal evidence given of the division and allotments being made or finished in any other mode or at any other period than in and by the execution of the award? Our opinion on this question is, that there was no such evidence. From the words of the act, the division and allotments were to be final and conclusive, when contained in an award or instrument in writing. From the nature of the subject, and from the constant practice of setting out allotments under inclosure acts, the allotments must be in writing. It was, therefore, incumbent on the defendant to prove that the division and allotments were made at an earlier period than by the award. The proceedings of the Commissioners would have been the legal evidence of this fact. It is stated in the case, that there were such proceedings, and that they were left in the custody of one of the Commissioners since dead; that they were not produced by the defendant, nor was any evidence given of any search or enquiry at the house or among the papers of such Commissioner, before or since his death, nor was any proof given of those minutes being destroyed. We think that the defendant appears not to have had any ground whatever for being let in to give the evidence, by which he purposed to prove that the division and allotments were made at an earlier period or at any other period than by the award. We think that no part of the evidence offered for this purpose was admissible, and therefore it is not material to observe on the effect it ought to have had if it had been admissible. The judgment of the Court therefore is, on the whole case, for the plaintiff.

1819.

BENDYSHE  
v.  
PEARCE.

Judgment for the plaintiff,

Monday,  
Nov. 29th.

BENETT v. COSTER.

A declaration in trespass contained four counts for fishing in the plaintiff's several and free fishery and taking away his fish. Pleas, first, not guilty; secondly, that the *locus in quo* belonged to J. S.; and thirdly and fourthly, that the several and free fishery belonged to him. The plaintiff newly assigned, setting out the abutments of his close, and traversed J. S.'s several and free fishery in his replication. Pleas to the new assignment, first, not guilty; secondly, that the close newly assigned, was the soil of J. S.; and thirdly, that he had common of fishery over it. The last issue was found for the defendant, as well as that part of the first issue which related

THIS was an action of trespass. The declaration contained four counts;—*first*, for breaking and entering the plaintiff's close covered with water, situate in the parish of *Enford*, in the county of *Wilts*, and catching and carrying away his fish; *secondly*, for breaking and entering the plaintiff's several fishery, in a river called the *Avon*, and carrying away his fish; *thirdly*, the like count for fishing in the plaintiff's free fishery; and *fourthly*, for catching and carrying away the plaintiff's fish. The defendant pleaded first, *not guilty*, on which issue was joined; *secondly*, that the taking the fish and carrying them away, in the first and last counts mentioned, were the same; and that the close covered with water, in the first count mentioned, was the soil and freehold of one *William Ackerman*, and that the defendant, as his servant, broke and entered into the said close and fished there, and caught and carried away the fish in the first and last counts of the declaration mentioned, as it was lawful for him to do; *thirdly*, as to the trespass in the second count of the declaration, that the several fishery therein mentioned, was the several fishery of the said *William Ackerman*, and that the defendant entered as his servant and fished there; *fourthly*, a like plea as to the third count, averring, that the free fishery in that count mentioned was the free fishery of *Ackerman*, and that the defendant entered as his servant and fished there. The plaintiff newly assigned to the second plea, setting out the abutments of the *locus in quo*, which was situate on a part of the river *Avon*, and traversed the defendant's several and free fishery on the third and fourth pleas in his replication; on the two latter of which, issue was joined. The defendant

to the second, third, and fourth counts of the declaration. All the other issues were found for the plaintiff, with 1*l.* damages and 40*s.* costs on the first count:—Held, that the defendant was entitled to the general costs of the action, deducting only the costs of such issues as were found for the plaintiff, on the ground that the whole cause of action had been substantially found for the defendant on the last issue.

pleaded to the new assignment, first not guilty, on which issue was joined; secondly, that the close newly assigned was the soil and freehold of *Ackerman*, and that the defendant entered as his servant and fished there; thirdly, that *Ackerman* was seised in his demesne as of fee, and that he and all those whose estates he now hath, had, and still ought to have, a common of fishery in the said part of the said close in which, &c. and had been accustomed to take and carry away, and still of right ought to catch and carry away, by himself and his servants, fish from time to time found in the said fishery, every year, at all times of the year, at his and their free will and pleasure, as belonging and appertaining to the said land, with the appurtenants, for which reason the defendant, as the servant of *Ackerman*, and by his command, broke and entered the same in the same part thereof in which, &c. and fished therein for fish in the common fishery of *Ackerman*, and the fish there found, took and carried away, as being the fish of the said common of fishery, as he lawfully might. The plaintiff, in his replication to the defendant's second plea to the new assignment, traversed that the close newly assigned was the soil of *Ackerman*, on which issue was joined, and to the third plea to the new assignment, he traversed *Ackerman's* alleged common of fishery over the part of the close, &c. newly assigned, and on which issue was also joined. By the *postea* to the whole of the record, as to so much of the issue first joined as related to the trespasses in the first count of the declaration, the defendant was found guilty, damages 1s., costs, 40s. and as to the residue of the premises in that issue, as to the second, third, and fourth counts of the declaration the defendant was found not guilty. As to the issue secondly joined, that the several fishery in the second count of the declaration was the several fishery of the plaintiff and not of *Ackerman*; as to the issue thirdly joined, that the free fishery in the third count of the declaration was the free fishery of the plaintiff, and not of *Ackerman*; and as to the issue fourthly joined, as to the trespasses by the plaintiff newly assigned, the defen-

1810.  
  
 BENETT  
 v.  
 COSTER.

1819.

BENNETT  
v.  
COSTER.

dant was found guilty; as to the issue fifthly joined, that the close in the second plea to the new assignment mentioned was not, nor at the several times when, &c. was the close of *Ackerman*;—as to the issue sixthly joined, that *Ackerman*, and those whose estate he hath, had, and still of right ought to have, a common of fishery in the close in the last plea to the new assignment mentioned, and ought by themselves or their servants, to catch and carry away fish at all times of the year, as belonging to the land.

The Prothonotary, on the taxation of costs, the whole cause of action being substantially found for the defendant, allowed to him the general costs of the action, deducting only the costs of such issues as were found for the plaintiff, precisely following the principle laid down in the case of *Trotman v. Holder* (a).

Mr. Serjt. *Lens*, on a former day in this Term, had obtained a rule *nisi* that the Prothonotary might review his taxation, and insisted that the plaintiff was entitled to his full costs, without deducting the costs on the issue found for the defendant, which was the common of fishery in the plea to the new assignment.

Mr. Serjt. *Pell* now shewed cause, and relied on the case of *Vivian v. Blake* (a), where it was held, that if besides the general issue, the defendant plead a special plea, which goes to the whole declaration, and there be a verdict on the latter issue for the defendant, and on the former for the plaintiff, with damages under 40s., the plaintiff is not entitled to full costs.

The Court being of opinion that the Prothonotary had been correct in his taxation, by following the principle laid

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(a) Ante, vol. iii. 555. S. C. 1 *Brod. & Bing.* 222.—(b) 11 *East*, 263.

down in *Trotman v. Holder*, as the whole cause of action was, in substance, found for the defendant, they ordered the rule to be.

1819.

—  
BENNETT  
v.  
COSTER.

Discharged, without costs.

BREACH, Demandant; HEWITT, Tenant; BRIERLEY,  
and Wife, Vouchees.

Monday,  
Nov. 29th.

MR. Serjt. *Taddy* moved that an affidavit, stating that the wife of the vouches had been examined separately from her husband, before a Commissioner in the country, as to her consent to suffer the recovery might be now filed. He founded his motion on an affidavit, which stated that the fact was so; but that no affidavit of such fact was filed when the other proceedings took place, and observed, that the Commissioner was now ready to swear that the wife had been examined separately from the husband,—But

No motion can be made as to the passing or amendment of fines or recoveries on the last day of Term.

An affidavit of a Commissioner, that the wife of a vouches was examined separately from her husband, cannot be received or filed if it was not made at the time the acknowledgment was taken.

*Per Curiam*.—It is now too late to receive such an affidavit; even if it were to be obtained, the recovery could not pass without the permission of the Court. It is necessary for the Commissioner to shew that the wife had been examined separately from her husband, an affidavit of which should have been made at the time the acknowledgment was taken. Besides, this Court has laid it down as an invariable rule, that no motion relative to fines or recoveries can be made on the last day of the Term, nor was this rule intended to be confined to amendments. The postponement of motions of this description are productive of the greatest inconvenience, and there can be no stronger proof of the danger that may accrue from the postponement of motions of this nature than this case affords. It is exceedingly doubt-



1819.  
BREACH,  
Demandant.

ful whether this recovery has been properly suffered or not; and if the motion had been made on a previous day in the Term, the circumstances attending it might have been investigated and set right.

The learned Serjeant, therefore, took nothing by his motion:

END OF MICHAELMAS TERM.

# CASES

ARGUED AND DETERMINED

IN THE

**Courts of Common Pleas**

AND

**Exchequer Chamber,**

*IN HILARY TERM,*

IN THE SIXTIETH YEAR OF THE REIGN OF GEORGE III.  
AND FIRST OF GEORGE IV.

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## MEMORANDA.

ON *Saturday, January* the 29th, died His Majesty King *George* the Third, and was succeeded by his present Majesty King *George* the Fourth, who, on the 31st of *January*, was duly proclaimed.

At the sitting of the Court, on the 1st of *February* following, the Judges took the oaths of allegiance, &c. to his present Majesty; and on the 3d his Majesty's Serjeants at Law, together with Mr. Serjt. *Heywood* and Mr. Serjt. *Marshall*, the former as Chief Justice of the *Carmarthen* Circuit; and the latter as one of the Justices of *Chester*, took the same oaths.

By the 57 *Geo. 3. c. 45.* persons holding any office, place, or employment, civil or military, were, at the demise of his Majesty, to continue to hold the same without any new patents, &c.

Those Counsel who had received patents of precedence in the last reign, took their seats without the Bar, as such patents were not mentioned in the Act. And

In the course of this Term *Thomas Peake*, of *Lincoln's Inn*, Esq. was called to the degree of Serjeant at Law, and gave rings, with the motto "*Æquâ lege.*"

1820.

## LEVIN and others v. WEATHERALL and others.

THE following Case was directed by the Master of the Rolls to be submitted to the opinion of the Judges of this Court.

A. by his marriage settlement, after giving himself and wife estates for life, with a power of appointment, limited, in default of such appointment, as follows :

" to the use of the children of the marriage, sons and daughters, equally, as tenants in common, and to the heirs of such children lawfully issuing ; and that in case there should be more children than one of the marriage, and any such child or children should happen to die under the age of twenty-one without issue, then as to the parts and

shares of all and every such child and children so dying, to the use of the surviving children, as tenants in common, and to the heirs of the body of every such child and children, until they should be dead ; and in case there should be but one child only of the marriage, or one only surviving child, then to the use of such surviving child, and the heirs of the body of such surviving child ; and for default of such issue, or in case there should be issue of the marriage, who should all die without issue, under the age of twenty-one, then to the use of the heirs and assigns of the survivor of A. and his wife for ever." A. having married, died intestate, leaving his widow and two children him surviving. The widow devised the property to her mother for life, and after her decease to J. S. in fee, provided her children should die before twenty-one without issue. She then died, leaving both children surviving, who afterwards became of age. One a daughter, married one of the defendants ; the other a son, died shortly afterwards, leaving his estates by will to his sister in fee.—Held, that on the death of the brother, the sister, who was already tenant in tail in possession of one moiety of the lands comprised in the marriage settlement, became, as heir at law of her brother, tenant in fee in reversion of that moiety, and tenant in fee in possession of the other moiety.

By indentures of lease and release of the 8th and 9th of December, 1731, between *Henry Woodgate*, of the first part ; *Ann Downing*, spinster, daughter of *Joseph Downing*, of the second part ; and the said *Joseph Downing* and *Henry Overton*, of the other part : reciting, that a marriage was intended to be shortly had and solemnized between the said *Henry Woodgate* and *Ann Downing* :—It was witnessed, that the said *Henry Woodgate*, for the considerations therein mentioned, did grant, bargain, sell, release, and confirm unto the said *Joseph Downing* and *Henry Overton*, their heirs and assigns, certain messuages, lands, and other hereditaments, situate at *Ulcombe*, in the county of *Kent*, To hold the same unto the said *Joseph Downing* and *Henry Overton*, their heirs and assigns, upon the uses, intents, and purposes following (that is to say), To the use of the said *Henry Woodgate*, his heirs and assigns, until the said marriage should be had and solemnized ; and from and after the solemnization thereof, then to the use and behoof of

the said *Henry Woodgate* and his assigns, for the term of his life, without impeachment of waste; and from and after the death of the said *Henry Woodgate*, to the use of the said *Ann Downing* and her assigns, for her life, without impeachment of waste; and from and after the death of the said *Henry Woodgate* and *Ann Downing*, and the survivor of them, to the use of such child and children of the intended marriage, in such shares and proportions, at such times, and in such manner and form as they the said *Henry Woodgate* and *Ann Downing*, during their joint lives, by any deed or writing, under both their hands and seals, executed and duly attested, or in default thereof, as the survivor of them, after either of them should die, by deed, writing, or will, under the hand and seal of such survivor, to be duly executed or attested, should direct, limit, or appoint; and for default of such direction, limitation, or appointment, and subject thereto, "to the use of all and every the child and children of the said intended marriage, both sons and daughters, equally, share and share alike, if more than one; as tenants in common, and not as joint tenants, and of the heirs of the body and bodies of all and every such child and children lawfully issuing; and that in case there should be more children than one of the said intended marriage, and any such child or children should happen to die under the age of twenty-one years, without issue of his or their body or bodies lawfully issuing, then and so often, and as to the part and share, parts and shares of all and every such child and children so dying, to the use of the survivors of such children, equally, part and share alike, if more than one, as tenants in common, and not as joint tenants, and to the heirs of the body and bodies of all and every such child and children lawfully issuing, until every such child and children should be dead, without lawful issue of their, each, and every of their bodies lawfully issuing; and that in case there should be but one child only of the said intended marriage, or one only surviving

1620.

LEVIN  
D.

WEATHERALL.

1820.  
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 LEVIN
 v.
 WEATHERALL.

child thereof, then to the use of such only, or only surviving child of the said intended marriage, be the same a son or a daughter, and of the heirs of the body of such only, or only surviving child; and for default of such issue, or in case there should be issue of the said intended marriage, who should all die, without issue of his or their body or bodies lawfully issuing, under the said age of one and twenty years, then to the use of the heirs and assigns of the survivor of them the said *Henry Woodgate* and *Ann Downing* for ever, and to, for, and upon no other use, trust, intent, or purpose whatsoever."—Shortly after the date and execution of the said indentures of lease and release, the said *Henry Woodgate* intermarried with the said *Ann Downing*.

The said *Henry Woodgate* died in the year 1740 intestate, leaving *Ann Woodgate* his widow. The said *Henry Woodgate* had issue by the said *Ann Woodgate*, two children, viz. *Joseph Woodgate* and *Ann Woodgate*.

The said *Ann Woodgate* the elder, after the death of the said *Henry Woodgate*, made and published her will in writing, bearing date the 14th of *February*, 1741, duly executed and attested in the manner required by law for devising freehold estates, and thereby, reciting the aforesaid settlement; and that she had two children by the said *Henry Woodgate*, viz. *Joseph* and *Ann*, both infants; and lest they should die before their or either of their attaining their respective ages of twenty-one years, and without having any lawful issue of their or either of their bodies; and as no appointment either by deed or will was made in the life-time of her said late husband, whereby the sole power of making a disposition of the aforesaid estate and premises, subject to the contingencies aforesaid, was then vested in her by virtue of the said indenture, in pursuance of which said power, provided her said children should respectively die before their ages of

twenty-one years, without issue lawfully begotten as aforesaid, she did thereby give, devise, and bequeath all the aforesaid messuages, lands, tenements, and premises, to her mother *Martha Downing* for life; and from and after her decease she gave and devised the same to *John Cooper*, his heirs and assigns for ever.

1820.

 LEVIN
 v.
 WEATHERALL.

The said *Ann Woodgate* the elder died in the year 1742, leaving her said two children *Joseph* and *Ann* her surviving, having made no other appointment or disposition of the estate at *Ulcombe* than by her said will. The said *Joseph* and *Ann* the younger both attained the age of twenty-one years. *Ann Woodgate* the daughter, in the month of *December*, 1754, intermarried with *Thomas Weatherall*. The said *Joseph Woodgate* duly made and published his will in writing, duly executed and attested, so as to pass freehold estates, and bearing date the 5th *November*, 1756, and thereby gave as follows: "And first, I will and direct that all my estates, both real and personal, shall be subject and liable to the payment of all my debts, my funeral charges, and the legacies hereinafter by me given." And, after giving several pecuniary legacies, he gave as follows: "All my real estates in the county of *Kent* or elsewhere, within the kingdom of *Great Britain*, subject and liable as aforesaid, I give, devise, and bequeath to my sister *Ann Weatherall*, the wife of the said *Thomas Weatherall*, her heirs and assigns for ever." The said *Joseph Woodgate* died shortly after the date of his will, without having revoked or altered the same, and without issue, leaving the said *Ann Weatherall*, his sister and heiress at law.

The estate at *Ulcombe* is subject to the custom of gavelkind.

The question for the opinion of the Court was, whether, upon the death of *Joseph Woodgate*, *Ann Weatherall* be-

1820.
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 LEVIN  
 v.  
 WEATHERALL.

came tenant in tail in possession of the messuages and hereditaments at *Ulcombe*, in the county of *Kent*, comprised in the indentures of lease and release of the 8th and 9th of *December*, 1731, or what other estate she had therein, or in any and what part thereof?

The case came on for argument in the course of the last Term, when Mr. Serjt. *Lens* for the plaintiffs contended, that cross-remainders were created by the terms of the settlement, not only from the manifest intent, but by the express words in the provision of the deed, which were of themselves sufficient to carry such limitations into effect. The words in the limitation, in default of appointment, "and in case there shall be more children than one of the said intended marriage, and any such child or children shall happen to die under the age of twenty-one years without issue of his or their body or bodies lawfully issuing, then as to the parts and shares of such child or children so dying, to the use of the survivors of such children, and to the heirs of their bodies," coupled with the words "until every such child and children shall be dead without lawful issue," are of themselves sufficient to shew that the estate should go over without any intent whatever. It is said, however, that this is to be distinguished from ordinary cases, as the share of a child or children, *dying under the age of twenty-one years*, without issue, is to go to the use of the survivors. If those words had not been introduced, the case of *Doe, d. Watts v. Wainewright (a)* would have been expressly in point, and governed the present. There, there were limitations in a deed; and it was argued, that cross-remainders could not be raised by implication; but Lord *Kenyon* observed, that "that case did not involve any question respecting the raising of limitations by implication, because the

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(a) 5 Term Rep. 427.

deed on which the question arose, contained express limitations by way of cross-remainders, not indeed in the formal language used by conveyancers, but in terms sufficiently denoting that it was the intention of the parties to the deed, that there should be cross-remainders as to some of the children." Although the limitation in that case was "to the surviving child or children," and not confined to those dying under the age of twenty-one, still, here, it is sufficient to shew that the parties intended that cross-remainders should be created. The case of *Meyrick v. Whishaw* (a) bears a near resemblance to the present, and is against the plaintiffs, where, the settlor by his marriage settlement, after giving remainders to his children and their issue, limited, that for default of such issue, and if any of such children, there being more than one, should happen to die without issue, before twenty-one, the share of such child so dying should go to the survivor; and in case of the death of all such children without issue, then to the use of the settlor in fee: and it was held, that there were no cross-remainders between the children of the marriage, except in the case of a child having died without issue, and under twenty-one; and that one of the children having died without issue, but after twenty-one, that his share vested in the settlor, and not in the survivor. Still, however, this case is distinguishable, as there the words were "until every such child and children shall be dead, without lawful issue of their and every of their bodies lawfully issuing," were not inserted. These words, when connected with the former, shew that the estate was to go over, both by the construction of the limitation, and the intent of the settlor; besides, when the provision is made in favour of one child only, the age of twenty-one years is not mentioned. Unless, therefore, this case must be governed by that of

1820.

LEVIN  
v.

WEATHERALL.

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(a) 2 Barn. & Ald. 810.



1820.  
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 LEVIN
 v.
 WEATHERALL.

Meyrick v. Whishaw, the plaintiffs would be entitled to recover, and more particularly so, as the words here are, at least, sufficient to shew that the intent of the settlor was to have created cross remainders.

Mr. Serjt. *Blosset*, *contrd.* The case of *Meyrick v. Whishaw* is expressly in point, and was decided after a full consideration of *Doe v. Wainwright*. Yet, that latter case alone, is a sufficient authority for the defendants. It has been contended for the plaintiffs, that cross remainders were created, *first*, from the intent of the settlor; and, *secondly*, by the express words comprised in the settlement; but it does not appear that it was his intent that cross remainders should be created, where either of the children died after twenty-one. The property too was gavel-kind, and settled by the husband and wife on the issue of their marriage. On the death of *Ann Woodgate* the mother, *Joseph Woodgate* and *Ann Woodgate* became each tenant in tail of one moiety of the estate in question, and on the death of *Joseph Woodgate*;—his sister, then *Ann Weatherall*, remained tenant in tail of one moiety of the estate, and tenant in fee in possession of the other moiety. It is also manifest that the settlor did not intend to create cross remainders for default of issue to those children dying without issue before twenty-one. It is even questionable whether the limitations as to children dying under twenty-one, would create cross remainders by implication, even in a will; but here they cannot be created without express words: and it is a well established rule, that cross remainders are not to be raised by implication in a deed. In *Doe, d. Cole v. Goldsmith (a)*, where *A.* devised to his son *B.* for life, and after his death to his heirs, in such shares as he should appoint; and in default of such

(a) 2 Marsh. 517. S. C. 7 Taunt. 209.

heirs immediately after his decease—over : It was held, that the general intention of the testator was, that the estate should not go over till after an indefinite failure of the heirs of *B.*; and therefore that *B.* took an estate tail by implication; but there, there were no express words.

1820.

 LEVIN
 v.
 WEATHERALL.

This case however falls within the rule laid down in *Doe v. Wainewright*, although the words of limitation are not the same, and the question there was, as to the meaning of the word *surviving*, whether it applied to the surviving children or the surviving issue of the children; and Lord *Kenyon* there commented on the meaning of the word *surviving*; and observed, that the fair construction of that word, standing in the context, was, that on the death of one child without issue, that portion should go to the surviving heir or heirs, and not merely to one child surviving; and that in putting that construction the Court did not proceed on conjecture merely, for the conclusion of the sentence was—"and in case *all* the said children should die without issue, then the remainder was limited to *A.* in fee." And the Court could not give effect to the word *all*, without determining that there must be cross-remainders, not only as long as the individual children, but as long as the several lives of those children existed; and his Lordship observed, that the whole context required that construction, and that the last clause could not be satisfied by any other. Mr. Serjt. *Williams*, in a note to *Cooke v. Gerrard* (*a*), observed, that cross remainders may be created by deed, but that it must be by express words; but that it was a fundamental rule, that cross remainders could not be implied in a deed; and in support of the latter position, the cases of *Doe, d. Tanner v. Dorrell* (*b*), and *Doe, d. Foquett v. Worsley* (*c*), are cited, and

(a) 1 *Wms. Saund.* 185, 186. — (b) 5 *Term Rep.* 518. —
 (c) 1 *East.* 416.

1820.

LEVIN

v.

WEATHERALL.

Lord *Kenyon* there said (a), that cross remainders might be raised by implication in a will, but that in the case of a deed, no such implication could be raised. Here, the exception as to children dying under the age of twenty-one years, is not sufficient to express limitations by way of cross remainders, neither does it of itself shew an intention to do so. Independently, therefore, of the case of *Meyrick v. Whishaw*, there can be no doubt but that the defendants are entitled to the estate in question.

Mr. Serjt. *Lens*, in reply.—The only question is, whether the defendants could have been entitled to judgment, if the case of *Meyrick v. Whishaw* had not been decided. The provisions contained in this deed were only meant for a particular event, viz. in case of children attaining the age of twenty-one years. As to the intention of the settlor, there is in point of fact only one distinction, whether it arises on a deed or will. In the one there must be express words of limitation, while in the other such words are unnecessary, as the intent may be implied without them. In the surrender of a copyhold estate, cross remainders seem formerly to have been implied; but Mr. Serjt. *Williams*, in a note to *Cooke v. Gerrard* (b), observed, that surrenders of copyhold estates must receive the same construction as deeds, which receive their operation from the statute of uses. Here, however, are the words of limitation, “heirs of their bodies;” and although the property be gavel-kind, it makes no difference. The provision here is, “that in case any such child shall happen to die under twenty-one, without issue, then as to the part and share of such child so dying, it shall be to the use of the survivors of such child equally, if more than one.” So in *Doe v. Wainewright*, the word *surviving* was held to

(a) 1 *East*. 428. — (b) 1 *Wms. Saund*. 186.

raise no objection to the creation of cross remainders. Both provisions, therefore, are substantially the same, as the words here, "until such child and children shall be dead without lawful issue," coupled with the others which precede it, render the whole sentence complete. It is true, there can be no cross remainders without an intention, and that express words of limitation are necessary in a deed to render such intent effective; but if the intent be clearly pointed out in a deed, as here, it is sufficient, and the case of *Meyrick v. Whiskaw* goes far beyond the general doctrine which had been before laid down in questions of this description.

1820.

 LEVIN
 v.
 WEATHERALL,

The following certificate was afterwards sent to the Master of the Rolls:—

This case has been argued before us by counsel. We have considered it, and are of opinion, that upon the death of *Joseph Woodgate, Ann Weatherall*, who was already tenant in tail in possession of one moiety of the messuages and hereditaments at *Ulcombe*, in the county of *Kent*, comprised in the indentures of lease and release of the 8th and 9th of *December*, 1731, became, as the heir at law of *Joseph Woodgate*, tenant in fee of the reversion of that moiety, and tenant in fee in possession of the other moiety.

R. DALLAS.
 J. A. PARK.
 J. BURROUGH.
 J. RICHARDSON.

1820.

BERNEY v. DAVISON.

A partnership which existed between A. and B. was dissolved by mutual consent. A. being separately possessed of freehold and leasehold estates, after the dissolution, conveyed them to trustees for sale or mortgage, and empowered them to execute such conveyances as they should think fit, for the purpose of converting his said estates into money, in order to enable him to carry on his trade, and to pay his creditors their debts, and it was agreed that such conveyances might be made and executed by the trustees, with or without the concurrence of A.; and that they should be seized or interested in the money arising from such sale or mortgage. When this deed was executed, A. had stock in trade, and other personal effects, to a considerable amount, independently of the partnership assets, which were not sufficient to pay the partnership debts. The trustees were not creditors of either A. or his partner. A. and his partner afterwards gave C. and Co. who were not creditors of either, a power of attorney, to make demands of every description, to examine and settle all the accounts, together with other powers to act for them, they agreeing to ratify whatever should be done under it. A deed was afterwards prepared by A. and his trustees, for the purpose of conveying all A.'s freehold and leasehold estates previously conveyed to D. and Co. to sell or mortgage, with a view to raise £130,000 and £40,000, in negotiable bills of exchange, and to indemnify the drawers and acceptors from the payment thereof; but these sums were not advanced, nor were the bills drawn, or any other act done under the latter deed:—Held, that neither the execution of the first conveyance to his trustees, nor power of attorney, under these circumstances, constituted an act of bankruptcy by A.

A CASE, of which the following is the substance, was sent, by the direction of the Master of the Rolls, for the opinion of the Judges of this Court.

For some years previously to, and in the month of *February*, 1819, *Edmund Boehm* and *John Taylor* were merchants and *East India* agents, trading in copartnership in the city of *London*, under the firm of *Boehm and Taylor*. *Taylor* was the acting partner, and *Boehm* had not interfered in the active conduct of the business of the partnership for twenty years prior to the dissolution thereof, hereinafter mentioned, at which time he was about eighty years of age. On the 15th of *February* in that year, the partnership was dissolved, by a memorandum, subscribed by *Boehm and Taylor*, of which the following is a copy:—

“Notice is hereby given, that the partnership lately subsisting between us the undersigned *Boehm and Taylor*, of *New Broad Street*, in the city of *London*, as merchants, under the

firm of *Edmund Boehm* and *John Taylor*, has been this day dissolved by mutual consent, and that the accounts of the said partnership will be adjusted and liquidated by *Boehm*, at *New Broad Street* aforesaid."

1820.

BERNEY
v.
DAVISON.

The trading was afterwards discontinued ; but at the time of the dissolution the partnership was indebted to different persons upon negotiable securities and otherwise, and *Boehm* was separately indebted to different persons, but was separately seised and possessed of, and entitled to divers freehold, copyhold, and leasehold estates in *England*. By indentures of lease, release, and assignment, bearing date respectively the 13th and 15th *February* (executed after the dissolution of the partnership), and made between *Boehm* of the one part, and one *John Thornton* and *Berney* of the other part, it was recited, that *Boehm* being so seised as aforesaid, was desirous of converting all his said freehold, leasehold, and copyhold estates into money, and as it would be convenient to him to raise money at an early period, and that *Thornton* and *Berney* were willing to assist him in that object, on being indemnified from all losses by reason of affording such assistance, *Boehm* had for those purposes determined and agreed to convey, assign, and surrender the said hereditaments respectively, with their appurtenants, to *Thornton* and *Berney*, their heirs, &c. upon the trusts, and subject to the powers and provisions thereafter expressed and declared of and concerning the same. And it was thereby witnessed, that, for the purpose of carrying such desire into effect, and in consideration of eleven shillings, *Boehm* did grant, bargain, sell, release, confirm, transfer, and set over, unto *Thornton* and *Berney*, and their heirs, executors, administrators, and assigns respectively, divers freehold and leasehold estates, with the appurtenants, being all his freehold and leasehold estates in *England*; and did for himself, his heirs, executors, and administrators, co-

1820.
~
BERNEY
v.
DAVISON.

venant with *Thornton* and *Berney*, their executors, administrators, and assigns, to surrender divers copyhold hereditaments, being all his copyhold hereditaments, to the use of *Thornton* and *Berney*, their heirs and assigns, "upon trust, that they the said trustees, or the survivors or survivor of them, or the heirs, executors, administrators, and assigns of such survivor, should forthwith, and at such time or times as they or he in their or his discretion might think fit, absolutely sell and dispose of the same, either together or in lots, and either by public auction or private contract, to any person or persons who should be willing to become the purchaser or purchasers thereof, or of any part thereof respectively, and for the best price or prices that could be reasonably had or gotten for the same; and in the mean time, and until such sale, should raise, by way of mortgage of all or any part of the same, for all or any part of the estates and interests thereby granted, or agreed to be granted or surrendered therein respectively, any sum or sums of money which the trustee or trustees for the time being might think expedient to raise, or which *Boehm* in his life-time, or after his death, his executors or administrators might require to be raised, by means of one or more mortgage or mortgages; and should, for the purpose of effecting such sales, mortgages, or dispositions as aforesaid, and either in the life-time or after the death of *Boehm*, enter into, make, and execute all such contracts, agreements, acts, deeds, conveyances, assignments, surrenders, and assurances, in the law, as trustees for the time being should think proper:" And it was agreed and declared, by and between the parties to the said indenture of release and assignment, "that all such contracts, agreements, acts, deeds, conveyances, assignments, surrenders, mortgages, and sales, as should or might be entered into, made, and executed by the said trustees for the time being, should or might be entered into, made, and executed, either with or without the concurrence of *Boehm*, his heirs, executors, ad-

ministrators, or assigns, as the said trustees for the time being should think proper; and should, whether *Boehm*, his heirs, executors, administrators, or assigns, should or should not join therein, or assent thereto, be, to all intents, effects, constructions, and purposes whatsoever, valid and effectual, and bind *Boehm*, his heirs, executors, administrators, and assigns, and all persons claiming or to claim by, from, through, under, or in trust for him, them, or any of them:" And it was thereby agreed and declared, " that the receipts of the trustees for the time being, for any money to arise from such sales, mortgages, or dispositions as aforesaid, or otherwise payable to them, by virtue of the said indenture of release and assignment, should effectually discharge the persons to whom the same should be given, from being answerable for the misapplication or non-application thereof:" And it was thereby agreed and declared, between the parties to the said indenture of release and assignment, " that the trustees for the time being should stand and be possessed of and interested in all and singular the monies to arise from such sales, mortgages, or dispositions as aforesaid; and also of and in the yearly rents, issues, and profits of the said manors, messuages, lands, and premises in the mean time, and until the same should be respectively sold, upon and for the trusts thereafter expressed; that is to say, upon trust, that the said trustees should, with and out of the same, in the first place, retain, deduct, and reimburse for themselves respectively, all such costs and expences as they should or might pay, or become liable to, in or about the execution and performance of the several trusts thereby created; and as to so much of the monies, rents, and profits as should remain, after satisfying the several purposes aforesaid, upon trust, in the first place, to pay all the costs and expences attending the preparing, engrossing, and executing the said indentures of lease, release, and assignment; and in the next place, to pay all principal money and interest which might from time

1820.

BERNEY
v.
DAVISON,

1820.

BERNEY
v.
DAVISON.

to time become due and payable in respect of any sum or sums of money which the trustees for the time being should raise, by mortgage of the said manors, messuages, lands and premises, or any of them, or any part thereof respectively, by virtue of the trusts for that purpose therein before declared; and in the next place, to indemnify and save harmless *Thornton* and *Berney* respectively, and their respective heirs, executors, administrators, and assigns, and all other persons, from such sum or sums of money respectively, as they, *Thornton* and *Berney* respectively, and their respective heirs, executors, and administrators, and any other person or persons who, at the request or with the concurrence or approbation of the trustees for the time being, jointly, with the consent or concurrence of *Boehm*, should be or become liable or engage to pay, on the account of *Boehm*, either alone or jointly with *Taylor* his partner, or jointly with any person or persons, either by way of advance or loan, or by the indorsement or acceptance of any bill or bills of exchange, or promissory notes, or notes of hand; and for that purpose, should pay the same sum and sums of money respectively, and all interest in respect thereof for the time being, to the person or persons entitled to such sum or sums of money and interest; or to those who, by payment thereof, should be entitled to stand in the place of the person or persons respectively, of whom the same money should be borrowed, or to whom the same should be guaranteed or secured, or made payable; and lastly, to pay, or cause to be paid, the ultimate remainder of the said monies (if any) to *Boehm*, his executors, administrators, and assigns, for his and their own absolute use and benefit, and as part of his personalty."

In the said indenture of release were also contained various other clauses, provisoes, and conditions, for vesting the balances, which, for the time being, should be in hand, in Government securities;—demising the lands and estates;—ap-

1820.

BERNEY
v.
DAVISON.

pointing other trustees, in case of death or refusal to act, &c. and counsel were to be at liberty to refer to the whole of the indentures. At the time of the execution of the said indenture of release, the other property of *Boehm*, independently of the partnership assets, which were not sufficient to pay the partnership debts, consisted of his furniture and plate, in three of his houses in *St. James's Square*, at *Bath*, and *Ottershaw*, the stock of his farm at *Ottershaw*, a reversion in funded property, timber, Bank stock, and other personal effects, to the value of about £27,000. *Berney* was not, nor is, a creditor of *Boehm* and *Taylor*, or either of them, on any account whatsoever, nor was *Thornton* their creditor, either on his own separate account, or jointly with his copartners. *Boehm* was rather induced to convert his freehold, copyhold, and leasehold estates into money, by reason of his advanced age, and to obviate the difficulties which might have arisen respecting the sale of his estates, and the payment of his debts, if he had died without executing any conveyances of such estates, or if, by reason of his age and infirmities, he had become unable to execute such conveyances, and under the circumstances before mentioned, and with the views, intents, and purposes aforesaid, he executed the said indentures, of the 13th and 15th of *February*, 1819. After the dissolution of partnership, and the execution of the said indentures of lease and release, *Boehm* paid, satisfied, and discharged the acceptances, and other negotiable securities of the late partnership, either out of his own separate funds, or out of the assets of the late partnership of *Boehm* and *Taylor*, until the 5th day of *March* following. After that time, the said negotiable securities, as the same became due, were taken up and paid by one *Edward Fletcher*, *James Alexander*, and *Henry Porcher*, of *Devonshire Square*, *London*, trading under the firm of *Fletcher, Alexander, and Co.*, for the honour of the drawers thereof.

1820.
BERNEY
v.
DAVISON.

Boehm and *Taylor*, at the time of the execution of the said indenture of release and assignment, were unable, from their pecuniary assets, to discharge their pecuniary engagements entered into on account of their partnership. After the execution of the said indentures of lease and release, viz. on the 27th day of *April* last, *Thornton*, *Berney*, and *Boehm* proceeded to sell by auction, some of the said freehold, leasehold, and copyhold estates of *Boehm*, for the purposes and the execution of the trusts therein specified, and the above-named defendant purchased part of the freehold property at such sale.


By a deed-poll, which was executed by *Boehm* and *Taylor*, dated 28th *April*, 1819, they did, and each of them did, nominate, constitute, and appoint *Fletcher*, *Alexander*, and *Porcher*, jointly, and each and every of them severally, their and each of their true and lawful attornies and attorney for them, and each of them, in their and each of their names or name, behalf or stead, to ask, demand, sue for, levy, recover, and receive; of and from all persons whomsoever and whosoever, all debts, sums of money, goods, wares, merchandizes, chattels, effects, and things, which were or should be due, owing, or belonging to them, upon or by virtue of any mortgages, agreements, bonds, bills, notes, or other securities, or otherwise howsoever, upon any account, loan, transaction, dealing, or engagement whatsoever, and for and towards the recovery and receipt of the said debts, &c. or any part thereof, to make such claims or demands, and sue and prosecute such actions or suits at law or in equity, as they their said attornies should think fit; and upon receipt of any such debts, &c. to execute such acknowledgments, receipts, and discharges for the same, as they their said attornies should think proper; and also to indorse any bills, notes, drafts, or orders, for money, which it should be necessary so to indorse, in order to obtain payment thereof; and also call

for, examine, and settle or disallow all accounts wherein they were or should be interested or concerned with any person or persons whomsoever, and receive the balance as the same should be found due; and likewise to compound, agree, and settle with any persons whomsoever, in such manner as they should think proper, for or in respect of any debt or sum of money, or other thing belonging to or payable to them;—or in respect of any account, transaction, or dealing whatsoever, to contest, prosecute, and defend, either at law or in equity, or otherwise, or to compound, submit to arbitration, or conclude or agree any questions or disputes in which they were or might be implicated respecting any transaction whatsoever, in such manner as they should think proper, and for the purposes aforesaid, to appear for them, and each of them, in Courts of Law and Equity; and might enter into, execute, and deliver such bonds of arbitration, releases, or other deeds whatsoever, as should be necessary or requisite, and generally to act for them and each of them, and in their behalf, and in such manner and as fully and effectually, to all intents and purposes, as they themselves could do if personally present; and they thereby gave full power to their said attorneys to substitute and appoint one or more persons to act as attorneys under them, to substitute and appoint another attorney or attorneys for the like purposes, as afterwards they should think proper; and they (*Boehm and Taylor*) thereby ratified and confirmed all and whatsoever their said attorneys, or any attorney to be appointed under them, should lawfully do, or cause to be done under, or by virtue of the said power of attorney.

1820.

 BERNER
 v.
 DAVISON.

Fletcher, Alexander, and Porcher, were not, nor were or was any or either of them, creditors or creditor of *Boehm and Taylor*, or either of them.

1820.

BERNEY
 v.
DAVISON.

By indenture of three parts, dated the 26th *June*, 1819, and made between *Thornton* of the first; *Boehm* of the second; and *Berney* of the third part—After reciting, that no act had been done, or money raised by *Thornton* and *Berney* in the execution or performance of all or any of the trusts created by the said indenture of the 15th *February*, and that *Thornton* was desirous of relinquishing the trusts reposed in him by the said indenture, and of being discharged from the same; and that *Boehm* was desirous and consenting that all the estate and interest of *Thornton*, under the said indenture of release, should be released or conveyed to *Berney* alone, upon the same trusts as the same were then vested in *Thornton*, jointly with *Berney*:—*Thornton* made a release and assignment, by which all his estate and interest was vested in *Berney*, as sole trustee, upon the trusts, and subject to the powers and provisoes declared thereof by the said indenture of release and assignment, in like manner as if he had been thereby appointed the sole trustee.

An abstract was furnished by the vendors to the purchasers of part of the freehold property, of a draft of a deed then in progress, in the expectation that that deed would be executed, with a communication at the time, that it had not been executed, and which deed never was engrossed, finally settled, or approved by any of the intended parties thereto, but was afterwards abandoned, and was not executed, of which the purchasers solicitors were informed by the vendors solicitors by letter of the 9th of *July* last, and which draft of a deed purported to be intended to be made between *Thornton* and the complainant of the first; *Boehm* of the second; and the several persons whose names were mentioned in the first and second columns of the schedule thereto of the third; *Fletcher*, *Alexander*, and *Porcher*, of the fourth; and *Edward Parry* and *Fletcher* of the fifth part—whereby, “After reciting, amongst other things, the said indentures of lease and

release, and assignment of the 13th and 15th of *February* last, and that *Boehm* and *Taylor* lately had occasion for the sum of £130,000, and that the several persons, whose names were mentioned in the first column of the schedule to the said indenture of release and assignment, at the request of *Boehm* and *Taylor*, or one of them, drew the several bills of exchange, described in the said schedule, in favour of *Boehm* and *Taylor*, upon the several persons whose names were mentioned in the second column of the said schedule, who, at the like request, and as surety for *Boehm* and *Taylor* jointly, and also of *Boehm* separately, had accepted the same bills of exchange, and that the said bills of exchange were respectively drawn and accepted by the several persons mentioned in the first and second columns of the schedule thereto, upon the faith and agreement of *Boehm*, that the same persons should be respectively indemnified by means of the trusts thereafter contained, for their benefit, from the payment of the same bills of exchange, and all costs, charges, and expences, which they might sustain or be put to on account thereof:—And further reciting, that *Boehm* and *Taylor* had discounted the said bills of exchange, amounting together to the sum of £130,000, with the Governor and Company of the Bank of *England*; and when the same bills should fall due, the loan was intended, (if the Bank of *England* should consent thereto), to be renewed by successive periods of two months, until *Boehm* and *Taylor* should be enabled to provide for and discharge the bills of exchange outstanding, for the time being:—And further reciting, that *Fletcher*, *Alexander*, and *Porcher*, had agreed to advance to or for *Boehm* and *Taylor*, at the request of *Boehm*, the sum of £40,000, and that it was probable that other sums of money might be advanced by them to *Boehm*, or to *Boehm* and *Taylor*, at the instance of *Boehm*; and that the said sum of £40,000 had been advanced, or was about to be advanced to *Boehm* and *Taylor*, on the agreement of *Boehm*,

1820.

BERNEY
v.
DAVISON.

1820.
BERNEY
v.
DAVISON.

that that sum and the interest thereof, and also all other sums which might be advanced by *Fletcher, Alexander, and Porcher*, to *Boehm*, his executors or administrators, or to *Boehm and Taylor*, at the instance of *Boehm*, his executors or administrators, together with interest on such last-mentioned sums, should be secured by means of the trusts thereafter declared, for the benefit of *Fletcher, Alexander, and Porcher*:—And further reciting also, that *Boehm* was desirous that the freehold, copyhold, and leasehold manors, messuages, lands, tithes, and hereditaments, comprised in the said indenture of release and assignment of the 15th of *February* last, should be vested in *Parry and Fletcher*, upon trust, for indemnifying the several persons whose names were mentioned in the first and second columns of the said schedule from the payment of the said bills of exchange, and every of them, or the renewed bills to be given in lieu thereof; and also for securing to *Fletcher, Alexander, and Porcher*, the said sum of £40,000 and other sums, which might from time to time be advanced by them to *Boehm*, or to *Boehm and Taylor*, at the instance of *Boehm*.—It was witnessed, that for carrying the desire of *Boehm* into effect, so far as related to the said freehold hereditaments and premises, and in performance of the said agreement on the part of *Boehm*;—*Thornton*, and *Berney*, at the instance and request, and by the direction and appointment of *Boehm*, bargained, sold, and released; and *Boehm* granted, bargained, sold, released, ratified, and confirmed, unto *Parry and Fletcher*, their heirs and assigns for ever, all the freehold manors, messuages, lauds, and hereditaments, which were comprised in, and conveyed by the said indentures of lease and release, and assignment of the 13th and 15th of *February* then last past;—To hold the same to the use of *Parry and Fletcher*, their heirs and assigns for ever, upon the trusts thereafter declared concerning the same; and in the said indenture was contained a covenant to surrender certain copyhold hereditaments, and an assignment of

certain leasehold premises, and also a declaration and agreement that *Parry* and *Fletcher* should stand seised of the said freehold, copyhold, and leasehold messuages, lands, and hereditaments, upon trust, of their own proper authority, and without any further consent or concurrence, by or on the part of *Boehm*, his heirs, executors, administrators, or assigns, to sell and dispose of the said freehold, copyhold, and leasehold manors, messuages, lands, and hereditaments :—And upon further trust, in the mean time, and until such sale, to raise, by mortgage of all or any part of the said freehold, copyhold, and leasehold messuages, lands, or hereditaments respectively, any sum or sums of money which *Parry* and *Fletcher*, or the survivor of them, his executors or administrators should think expedient to be raised, or which *Boehm* should require to be raised for the purposes of that indenture :—And it was thereby declared, that *Parry* and *Fletcher* should stand and be possessed of and interested in the money which should arise from such sales or mortgages, and from the yearly rents and profits of any of the said manors, messuages, lands, and hereditaments, which should be received by him or them in the mean time, until the same should be so sold, Upon trust, in the first place, to reimburse themselves all costs and expences which might be incurred in the execution of the trusts thereby created, and, in the next place, to indemnify and save harmless the several drawers and acceptors respectively of the said bills of exchange, and their respective heirs, executors, administrators, or assigns, against all loss, costs, charges, and expences, which they might sustain, expend, or be put unto, on account of the same; and also pay or cause to be paid to *Fletcher*, *Alexander*, and *Porcher*, the sum of £40,000, and interest for that sum; and also all other sums of money which *Fletcher*, *Alexander*, and *Porcher*, should from time to time advance to *Boehm*, his executors or administrators, or to *Boehm* and *Taylor*, at the instance of *Boehm*, his executors or adminis-

1830.

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BRUNY
 v.
DAVISON.

1822.
 ROBERT
 v.
 DAVISON.

trators, with interest on all such sums as therein mentioned, and to put the several persons named in the said schedule, and also *Fletcher, Alexander, and Porcher*, on a like or equal footing, by paying to the several persons named in the said schedule, or to their heirs, executors, administrators, or assigns, the amount of the damages sustained by them respectively, and to *Fletcher, Alexander, and Porcher*, the said sum of £40,000, together with interest for the same, without regard to any further sum and sums of money to be advanced by them to *Boehm*, his executors or administrators, or to *Boehm and Taylor*, at the instance of *Boehm*, his executors or administrators, rateably, and without any privity or preference whatsoever of any one or more of them, the several persons named in the said schedule, or of *Fletcher, Alexander, and Porcher*, or their respective heirs, executors, administrators, and assigns, over any other or others of them, or his or their heirs, executors, administrators, or assigns; and for this purpose of equality, the damages sustained by the persons who had given and should give the said bills of exchange, and the said £40,000, advanced or to be advanced by *Fletcher, Alexander, and Porcher*, as aforesaid, for such and so many parts of the said damages and advance as should remain unpaid, should form one total, and the said produce should be divided between the persons respectively entitled to the same damages and money, rateably by a pound rate, until they should have received the full amount of the same damages and money respectively, and all interest payable in respect thereof; and upon further trust, after receiving from *Boehm*, his executors or administrators, or from *Boehm and Taylor*, or raising, by the ways and means aforesaid, and paying and retaining the said sum and sums of money, costs, charges, disbursements, and expences, to render and pay all the surplus or residue, if any, which should remain of the money arising from the said sale or sales, or from any of the ways or means aforesaid, unto *Boehm*, his executors, admini-

1820.

Boehm
v.
Davison.

nistrators, and assigns, to be considered at all events as personal estate, discharged from all claim on the part of the heir at law of *Boehm*; and the said several manors, messuages, lands, and hereditaments, should thenceforth be considered as money, and as converted into personal estate. The sums of £180,000 and £40,000 mentioned in the said draft were not, nor was either of them, or any other sum advanced or raised, nor were the bills of exchange mentioned therein, nor any of them drawn, nor any other act contemplated in the said intended instrument performed.

The question for the opinion of the Court was, "Whether the execution of the said indenture of release and assignment, bearing date the 15th day of *February*, 1819, and of the said power of attorney, dated the 28th day of *April*, 1819, and the circumstances aforesaid, or any of them, were, under the circumstances, an act of bankruptcy by the said *Edmund Boehm*?"

The case came on for argument in the course of the last Term, when Mr. Serjt. *Lens* for the plaintiff submitted, that on consideration of the various decisions in cases applicable to this question, they have established the principle, that if a trader conveys all his estate by deed, or thereby loses all controul over his property and effects, it amounts to an act of bankruptcy, although it be done without a fraudulent intention. So, a conveyance of part of a trader's effects by deed, will occasion the deed to be fraudulent, and constitute an act of bankruptcy, though there be no intention of fraud, as if it be done in contemplation of giving a preference to one or more of his creditors to the exclusion of others; for although a conveyance of the greater part of his property may be considered fair and honest, yet a colourable exception will render the deed inoperative and illegal. But a transfer of part of a trader's estate, for the purpose of raising money

1830.

BERNEY
 v.
DAVISON.

by way of mortgage, or for carrying on trade, is not an act of bankruptcy. Here, there was clearly no transfer of all *Boehm's* effects, but merely of his freehold, leasehold, and copyhold estates; and the motive of the conveyance was to protect, and not to defraud or delay his creditors, and to produce the means of discharging the engagements of the partnership of himself and *Taylor*. At the time of the execution of the deed, he was in the possession of personal property, and his stock in trade. Besides, the assignment of his estates was made for the purpose of raising money to carry on his trade more effectually. If a trader were deemed to commit an act of bankruptcy, by raising money by way of mortgage, it would be a very great hardship; as such trader would then be deprived of any means he might have to carry on his trade; for he could not raise any supplies to carry on such trade by the sale or disposition of his personal effects. Here, therefore, there was no personal or individual fraud intended, neither does the transfer amount to a fraud in law, as there was a very large surplus remaining after the freehold and leasehold property was conveyed. As the deed of release, by which *Thornton's* estate was vested in *Berney*, was not executed, it has no operation whatever. So, the power of attorney stands quite alone, as the parties were not to supersede or divest *Boehm's* rights, or controul his power to trade. Besides, the whole was merely in contemplation; and consequently no fraudulent intention whatever is shewn in this case. Neither could any injury accrue to *Boehm's* creditors, as the money to be advanced by the deed was for their benefit. But further, this was not a transfer of the whole of his property, or even a part of it, in order to give a fraudulent preference. A case that bears the nearest resemblance to the present, is that of *Law v. Skinner* (a). But there, there was an assignment of all the

(a) 2 Sir W. Bl. 996.

trader's stock in trade, together with two leasehold houses, to a creditor by way of mortgage, and it was considered fraudulent, and an act of bankruptcy, as being an assignment of all his stock in trade, without which he could not carry on his business. Here, however, *Boehm* retained possession of all his personal effects, and only parted with his freehold, leasehold, and copyhold estates.

1830.
BANKRUPT
v.
DAVISON.

Mr. Serjt. *Bosanquet* for the defendant, contended, that the deed of release and assignment of the 15th of *February*, 1819, was in itself an act of bankruptcy; and if not, that the subsequent deed and power of attorney to *Fletcher* and Co. amounted to such an act. The authorities on this subject are divided into two classes, first, where all the property of a trader is conveyed, whereby an act of bankruptcy is committed independently of fraud, or contemplated insolvency; and, secondly, where part of such property is conveyed in contemplation of fraud, or committing an act of bankruptcy. It is true, that in this case, a considerable surplus remained in the hands of *Boehm*, and that the deed of the 15th of *February* did not convey the whole of his property. Still, however, such conveyance falls within the principle laid down in all the decided cases, and is also within the second section of the 1st *Jac.* 1. c. 15(a). It is also true, that property to the amount of £27,000 was not covered by this deed; but *Boehm* and *Taylor*, having dissolved partnership, stopped payment, and their effects were insufficient to satisfy their debts: besides, *Boehm* stopped payment on his separate account also, and his effects were likewise insufficient to discharge his debts; but the deed covers all

(a) By which it is enacted (among other things), that all and every person using the trade of merchandize, who shall make or cause to be made any fraudulent grant or conveyance, of his, her, or their lands, tenements, goods, and chattels, to the intent, or whereby, his, her, or their creditors shall or may be defeated or delayed the recovery of their true debts, shall be accounted and adjudged a bankrupt to all intents and purposes.

1830.

BRADY
v.
DAVISON.

his freehold, copyhold, and leasehold property, which was conveyed to trustees, and not to creditors, to satisfy the debts due, either from him individually, or in partnership with *Taylor*. Neither was it conveyed for the purpose of sale; nor for money to be ultimately received by *Boehm*; nor in trust, to be subject to his control; but transferred by a deed, authorising trustees to dispose of his property to persons who might advance money for that purpose. Neither was it stated what the ultimate result was to be, or whether the property was sufficient to answer the purposes of the deed, or the amount required to be raised thereby. The terms of the deed take the whole of the management and control from *Boehm*, over all the property which passed by it. If this deed were valid, the commission could not touch *Boehm's* property which had been conveyed by it to the trustees;—but only his stock in trade and other personal effects. It has been contended for the plaintiff, that unless this deed had conveyed all the property, it cannot fall within the cases that have been decided on this subject, unless there be an intention to defraud or give a preference to some creditors, whereby the others might receive an injury; but that is not the principle on which those cases have been decided; for the words of the statute of *James* do not say that a person is to convey away all his property, but that he who shall make *any* fraudulent grant, whereby his creditors may be defeated or delayed, shall be adjudged a bankrupt; and it has been invariably held, that where a trader conveys all his property, it falls within the spirit of the statute, although it be not fraudulent, as the property is thereby taken out of the control of the bankrupt. So here, the assignees could have no control over the management of the principal part of *Boehm's* property, if this deed be considered as operative and binding. [Mr. Justice *Richardson*.—If *Boehm* had committed an act of bankruptcy before the trustees had done any thing under this deed, would not the whole of the property have passed to the commissioners?] In general cases it would; but here

the deed is so constructed, that any person who may advance money under it, will have a prior claim to the commissioners; and in every case yet decided, it has been held, that if there be any thing like a voluntary preference in a deed, it is void. An intermediate case has never yet been determined, but where property has been sold *bonâ fide*, in satisfaction of debts due from the bankrupt; it has been held to be protected by the statute. The leading principle is, that where in effect, a deed is intended to delay general creditors in receiving payment of their debts, it is an act of bankruptcy. This deed would clearly amount to such delay. If the property had been conveyed to a person who had actually advanced the money, there would be no doubt. But it is conveyed to trustees, and wholly taken out of the control of *Boehm* himself, as well as the commissioners, although no sale has taken place. In *Harman v. Fisher* (a), Lord Mansfield said, "that a trader cannot assign his effects to all his other creditors in exclusion of one whom he thinks dishonest or unjust, nor even to be equally divided amongst all his creditors; because he cannot take his estate out of that management which the law puts it into; and that if any act of this sort is done by deed, it is not only void, but in itself an act of bankruptcy from the date of the deed." If, therefore, a trader conveys a large portion of his property by deed, and the remainder continues untouched, this principle applies, as it tends to delay his creditors, because he cannot take his estate out of that management which the law directs. If a trader convey a single acre of land in contemplation of a preference to a creditor, it constitutes an act of bankruptcy. A conveyance of all, therefore, is wholly unnecessary; as if part of the property be taken out of its proper course, it tends to defeat the claims of other creditors. In *Rust v. Cooper* (b), Lord Mansfield referred to the case of *Linton*

1820.

 BARNET
 &
 DAVISON.

(a) *Cowp.* 123. ————— (b) *Id.* 633.

1820.

BERNEY
v.
DAYISON.

v. Bartlet (a), where it was decided, that a conveyance by deed, of a third part of the bankrupt's effects only, and a fair transaction with the party, was fraudulent and void as against the rest of the creditors, and in itself an act of bankruptcy. And his Lordship, in laying down the general principle in *Rust v. Cooper* (b) said, that "a fraudulent contrivance with a view to defeat the bankrupt laws was void, and annulled the act of bankruptcy; that every case that had determined a conveyance by a trader of his whole effects, to pay a creditor, to be an act of bankruptcy, proceeded on this foundation—that it was fraudulent against the bankrupt laws, and therefore void; and that every case which said it was an act of bankruptcy, if one creditor only is excepted out of such conveyance, went upon the same principle—that it was long ago determined that a conveyance of all a man's effects was clearly a fraudulent conveyance; and that leaving out something, or a part, by way of colour, would not mend it." If, therefore, a trader convey the principal mass of his property by deed, it is fraudulent, and the rights of his creditors are thereby defeated. It is true, that in *Linten v. Bartlet* the Court held the deed to be void, considering that the trader had an act of bankruptcy in contemplation, and that it was partial and unjust to the other creditors; but Lord Mansfield does not consider that to be a principal ingredient in laying down the general principle in *Rust v. Cooper*. In *Morgan v. Horseman* (c) Sir James Mansfield stopped the plaintiff's counsel, observing, that "it was unnecessary to cite cases to shew that every deed of assignment of part of a man's property, whereby his creditors might be defeated or delayed, was an act of bankruptcy; and that although in *Wilson v. Day* (d) the Court countenanced the idea that nothing but an assignment of the whole, would be deemed an act of bankruptcy, that was not now deemed a necessary ingredient." There too that learned Judge relied on the principle

(a) 3 Wils. 47. — (b) *Cowp.* 632. — (c) 3 Taunt. 243. —
(d) 2 Burr. 830-1.

1829.

BERNEY
v.
DAVISON.

that creditors were delayed, and their rights defeated, because the bankrupt's property could not receive an equal distribution under the commission. It has been said, however, that this deed was effected for the purpose of enabling *Boehm* the better to carry on his trade; but that does not appear on the face of it, neither was there any proof of his intention to do so after it was executed. As to the power of attorney to *Fletcher and Co.*, it does not mention whether all *Boehm's* property was sufficient to satisfy his creditors, and an absolute power of control was given to the former over the whole of his property, which had been conveyed by the former deed, and the sums that might be raised in consequence of the sales of his freehold and leasehold property. This latter instrument therefore, makes an entirely different arrangement in point of law, as to the whole of his property; for although it did not in strictness amount to a conveyance, still *Boehm* was bound by it, and he had no control over any part of his property; for *Fletcher and Co.* were thereby empowered to execute a deed, and convey the property in his name. If, therefore, the first deed did not tend to delay the creditors, still, coupling it with the power of attorney, and the whole of the arrangements between the parties, the object was to take all *Boehm's* property out of its legal course. If all the property had been conveyed, it is quite clear that it would have amounted to an act of bankruptcy; and even if it be colourable, the same principle is applicable. Although the last deed was not executed, the object of all the proceedings shew that the trustees were to have the control of all *Boehm's* property instead of the commissioners; and no case has been cited where a conveyance of property, with the exception of part only, has not been held to amount to an act of bankruptcy.

Mr. Serjt. *Lens* in reply.—This question does not involve the ultimate distribution of *Boehm's* property. There is no case analogous to the present, nor has it ever been decided, whether a deed of the description of the conveyance of the

1820.

BERNEY
&
DAVIDSON.

15th of *February* amounts to an act of bankruptcy. The general principles relied on for the defendant must be confined to the particular circumstances of each particular case. Where a fraudulent preference is intended to be given by a trader to some of his creditors, it is clear that a part of his estate cannot be taken out of his control for the purpose of such preference; here, however, no preference whatever was intended, but merely to remove the embarrassments under which *Boehm* laboured. If the principles contended for be allowed to their fullest extent, a trader can in no instance part with even a *scintilla* of his property, nor raise money by way of mortgage, for the purpose of carrying on his trade; but here, the deed did not put the property out of the control of *Boehm* before any advance was made, or sale effected; for the trustees could not hold against his assignees, unless money had actually been advanced, or there had been an express agreement so to do, in which case his assignees might be considered as new trustees. The trustees were appointed jointly with the consent of *Boehm* by deed. It was not in their discretion what sum of money should be raised, but the application of the monies alone when advanced was to be attended to by them, subject to his control; and the whole object of it was to remove his embarrassments. Here, no part of *Boehm's* property was colourably kept back, nor was there even a shadow of an undue preference, but it was a mere assignment for the purpose of enabling him to carry on his trade; and this, as yet, has never been held to be an act of bankruptcy. A trader may sell or dispose of part of his property before he commits an act of bankruptcy, although such property may be vested in others, provided he does not part with the whole, or convey such part with a fraudulent intent. It may be therefore clearly inferred, that a trader may exercise a fair dominion over part of his property, so as not to contravene the effects of the statute. The power of attorney was given after the dissolution of the partnership, and enabled *Fletcher and Co.* to act as *Boehm*

himself might do: if they had conveyed the property, it would have been a different question; besides, no absolute interest passed to them, and nothing was ever done under it. The property therefore remained in the same state as it was before; and the original deed of *February*, 1819, can only be reverted to, the objects of which were to raise money to enable *Boehm* to carry on his trade, and effectuate a settlement with his creditors.

The following certificate was afterwards sent to the Master of the Rolls:—

“This case has been argued before us by counsel. We have considered it, and are of opinion that the execution of the indenture of release and assignment, bearing date the 15th day of *February*, 1819; and of the power of attorney, dated the 28th day of *April*, 1819, and the circumstances mentioned in the case, were not, nor was any of them, an act of bankruptcy by the said *Edmund Boehm*.”

R. DALLAS.

J. A. PARK.

J. BURROUGH.

J. RICHARDSON.

MYERS v. WILLS.

MR. Serjeant *Vaughan* moved for an attachment against the defendant, for a contempt of the process of the Court: on an affidavit, which stated, that he rented premises of the plaintiff, to whom he had long been in arrear for rent; that on the 27th *December* last, the defendant (although at home) denied himself to the officer who had the process to serve on him; but that he was afterwards served by the officer with

1820.

BERNEY
v.
DAVISON.

Tuesday,
Jan. 25th.

A defendant, on being served with a copy of a *capias*, tore it in pieces, and threw it at the officer:—Held, not to amount to a contempt of Court for which an attachment might be granted.

1820.

MYERS
v.
WILLS.

a copy of a *capias*, when he tore it in pieces, and threw it at him. The learned Serjeant insisted, that the contempt of process was of itself equivalent to an assault on the officer, and cited *Dalton's Justice* (a), where it is laid down, that if a person, on being served with a magistrate's warrant, cast it into the dirt, or tread it under his feet, it is an offence for which he may be bound to his good behaviour, and also be indicted and fined.

But, *Per Curiam*:—The defendant was actually served. If the officer had been prevented from so doing, we might have grounds to interfere.

The learned Serjeant, therefore, took nothing by his motion (b).

(a) Page 445.—(b) See *Adams v. Hughes*, 1 Taunt. & Brod. 24.

Tuesday,
Jan. 25th.

PEPPER v. GORHAM.

If arbitrators, having proceeded in a reference, inform the defendant present at the meeting, that they would suspend their proceedings till books of account had been referred to, and they afterwards make an award in his absence, without examining such books:—Held to be a good ground for setting aside the award.

MR. Serjt. *Taddy*, in the last Term, obtained a rule *nisi*, to set aside an award, on the ground that the arbitrators having partly proceeded in the reference, declared they could take no further proceedings, till some books of account had been looked into and examined; that the defendant, in consequence, left the meeting, considering the proceedings as suspended till those books had been referred to, but that the arbitrators afterwards examined a witness, in the absence of the defendant, when they determined, that it was unnecessary to inspect the books, and signed a minute of their award, which was not executed till after the application to set it aside had been made.

On Mr. Serjt. *Hullock's* shewing cause this day, the Court held, that at all events, the defendant should have had notice that it was unnecessary for the arbitrators to have inspected the books, and that it was immaterial whether the award was actually executed before the application to set it aside was made.

1820.
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PEPPER
v.
GORHAM.

Rule absolute.

HEATH, Assignee of the Sheriff of SUSSEX, v. GURLEY. Wednesday, Jan. 26th.

THIS was an action by the assignee of the sheriff of *Sussex*, on a bail-bond.

If proceedings on a bail bond are irregular, or against good faith, it is unnecessary to put in bail before application is made to set them aside. *Secus*, if regular, and the defendant applies to set them aside on terms.

In the last Term, Mr. Serjt. *Lawes* had obtained a rule nisi, that all proceedings on the bond might be set aside, on the ground that bail had not been put in and perfected.

On Mr. Serjt. *Vaughan's* shewing cause, on the last day of that Term, the Court made the rule absolute.

Mr. Serjt. *Vaughan* now moved to discharge it;—and it appearing that the proceedings on the bond had been regular, the Court would not allow the defendant to move to set them aside, until bail had been put in, and they now laid down the rule, that where the proceedings on a bail-bond are irregular, or against good faith, it is not necessary to put in bail; but that when they have been regular, and the defendant applies to set them aside on terms, it is necessary for bail to be put in before the application is made.

1820.

Thursday,
Jan. 27th.

ARMET and Others v. INNES.

On a policy at and from *London* to *New South Wales*, and from thence to the ship's loading port or ports, in the *East Indies* and elsewhere, and that she might proceed and sail to, and touch and stay at, any ports or places whatsoever and wheresoever, and for any purpose whatsoever. The ship went from *London*, with convicts, to *New South Wales*, where, having discharged them, she proceeded, in ballast, to *Batavia*, where she took on board a quantity of iron, and discharged the same at *Sourabaga*, and was there loaded with a full cargo of rice; with which she proceeded to the *Mauritius*, where it was discovered that she had sustained an injury, and she was accordingly broken up:—Held to be no deviation, although it was insisted, that by the terms of the policy the ship was only warranted to go to her loading ports, and not to trade or take in a fresh cargo.

THIS was an action of *assumpsit*, on a policy of insurance on the ship *Friendship*. The voyage, at the head of the policy, was described as, “at and from *London* to *New South Wales*, and at and from thence to the ship's loading port or ports, in the *East Indies*, *Persia*, *China*, or elsewhere, forwards and backwards, and backwards and forwards, as well on the other side, as at and on this side the *Cape of Good Hope*, in ports and at sea, at all times and in all places, on all services, until her safe arrival at her final port of discharge in *Great Britain*.” And in the body of the policy was incorporated, that “it should be lawful for the vessel in the voyage insured, to proceed and sail to, and touch and stay at, any port, ports, or places whatsoever and wheresoever, and for any purpose whatsoever, without being deemed any deviation, and without prejudice to the insurance.”

At the trial of the cause before Lord Chief Justice *Dallas*, at *Guildhall*, at the Sittings after the last Term, it appeared in evidence, that the vessel went with convicts from *London* to *New South Wales*; that having discharged them, she went from thence in ballast to *Batavia*, where she took on board a quantity of iron in bars, which she discharged at *Sourabaga*, and was there loaded with a full cargo of rice; that she then sailed therewith for the *Mauritius*, where 250 tons of rice were unloaded, as it was intended to ship cotton on freight in lieu thereof; but that having unloaded the above 250 tons, it was discovered that the ship had sustained

an injury in the previous part of the voyage, and she was ultimately broken up.—For the defendant, among other objections, it was insisted, that this was a deviation from the voyage warranted by the policy, as the risk insured against was only to the ship's loading ports, but no liberty was given to trade, unload, or take in a fresh cargo, or to continue to trade for any indefinite period. His Lordship, however, was of opinion, that though a liberty to trade was not given by the policy, still, that it embraced sufficiently general and comprehensive terms to cover the voyage in question, and that as to the period for which the voyage was to be limited, it must be considered a reasonable time; that it was the duty of the underwriter to know the nature of the trade, which appeared in this case to be to go from port to port, and trade or barter in the manner proved. The Jury accordingly found a verdict for the plaintiffs.

1820.

ARMET
v.
INNES.

Mr. Serjt. *Vaughan* now moved, that this verdict might be set aside, and a nonsuit entered, or a new trial granted, and insisted, that by the terms of the policy the vessel was confined to go from *New South Wales* to her loading ports only, for the mere purpose of procuring a cargo, but that she was not entitled to discharge, barter, or exchange, until her arrival at her final port of discharge in *Great Britain*; that the liberty in the body of the policy for the vessel to touch and stay at any places, for any purpose, without being deemed a deviation, was subordinate to the voyage insured, and therefore could not warrant a bartering or trading, unless by the voyage insured a liberty had been given so to do; and that as a liberty to trade had not been introduced in the beginning of the policy, the vessel should have been restrained to the ports of loading, by which trading would have been altogether excluded.

Lord Chief Justice DALLAS.—I see no reason to differ from the opinion I entertained at the trial. It was shewn,

1820.

ARNET
v.
LINES.

that this mode of trading was usual in voyages of this description, and there was no question as to the unreasonableness of time. By the terms of the policy, the ship might touch and stay at any ports or places, for any purpose whatsoever, without being deemed a deviation. The Jury, too, found that this was the usual course adopted in voyages of this nature, and after the defendant had failed in proving the vessel to be unseaworthy or overloaded, it was contended, that the voyage should have been confined to the ship's loading ports. I therefore think this verdict ought not to be disturbed.

Mr. Justice PARK.—Looking at this policy,—the finding of the Jury,—and the construction the Court ought to put on the instrument, I concur with my Lord Chief Justice, in thinking that this verdict ought not to be disturbed. The terms contained in the policy cannot be more general or extensive. The voyage insured against is from *London* and back. Policies generally vary in their terms, and it is seldom that two are precisely alike. But here, the vessel might sail to, and touch and stay at any ports or places whatsoever, and for any purpose whatsoever. Is not trading a purpose? If an underwriter enter into a contract of this description, it is his own fault, and he does it at his own peril. If the vessel had touched at too many places, or staid an unreasonable time, it would have been a question for the Jury; but they found, that she pursued no unusual course in a voyage of this description.

Mr. Justice BURROUGH.—I think it quite clear, that this must be considered as one voyage, and that from the general terms contained in the policy, the vessel might go where she pleased, and for any purpose that might be thought proper.

Mr. Justice RICHARDSON.—I am of the same opinion. The vessel was not confined to go from *New South Wales* to her loading ports; for by the general terms mentioned in the policy, she might go to any other ports, and for any purpose whatsoever, without being deemed a deviation. It appears too that she took in some portion of loading at all the ports she touched at in the progress of her voyage, which was from *London* and back.

1820.

ARMET
v.
INNES.

Rule refused.

The LONDON ASSURANCE COMPANY v. BUCKLE.

Friday,
Jan. 28th.

THIS was an action of debt on a bond for £2000 duly executed by the defendant, dated the 5th of *February*, 1811. The declaration was in the common form, stating the defendant's liability to pay the plaintiffs on request.

A bond was executed by an insurance broker, as the principal obligor, and two sureties, with a condition, that if they should pay the obligees certain premiums which should become due for assurances on ships at sea, as should be made with the obligees by the insurance broker, and that within six months after the making the assurances, the bond was

The defendant suffered judgment by default, and the following suggestion was entered on the Roll, pursuant to the statute 8 & 9 *W. 3. c. 11. s. 8.*

That the bond whereon judgment was recovered against the defendant, was made and given by him, subject to a condition thereto subscribed, whereby, after reciting, that one *William Hamilton* had already made, and did propose to make, assurances with the *London Assurance*, upon ships and merchandize, at sea and going to sea, the *London As-*

to be void. The broker became bankrupt, and was indebted to the obligees in a considerable sum for premiums, and they received a dividend of six shillings in the pound under the commission. The premiums were due three years before the bankruptcy, and the obligees did not call on the sureties until after the bankruptcy:—Held, 1st, That the sureties were not discharged by the laches of the obligees in suffering the credit of the broker to run on so long beyond the six months stipulated by the bond; and, 2dly, That the dividend received by them under the commission, was to be deducted as against the sureties, from the penalty contained in the bond.

1820.

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LONDON
ASSURANCE
COMPANY
v.
BUCKLE.

insurance giving him six months credit for the payment of the premiums of the assurances he should from time to time make with them, and allowing him to retain to his own use, as his brokerage or commission, after the rate of £5 *per cent.* on the amount of such premiums, and that one *William Boyd*, and the defendant, had agreed to become bound with *Hamilton* as security for his performance of the said agreement, which proposal the plaintiffs had accepted; it was declared, that if *Hamilton, Boyd*, and the defendant, or either of them, did and should, from time to time and at all times thereafter, well and truly pay, or cause to be paid, unto the *London Assurance*, or their assigns, the premiums which had been agreed upon, and were and should be due, and which should thereafter, from time to time, be agreed upon and be due for such assurances upon ships and merchandizes, at sea or going to sea, as then already had been made, and as thereafter should be made with the plaintiffs by *Hamilton*, and that within six months after the making such respective assurances, deducting and detaining thereout only for his brokerage or commission, after the rate of £5 *per cent.* on the amount of the premiums which should from time to time become due and payable to the defendant, then the bond was to be void and of no effect, but when and as often, as default should be made, then to be and remain in full force and virtue. That before and after the making the bond, and the condition thereof, to wit, on the 21st of *January*, 1811, and on divers other days between that day and the 7th of *April*, 1813, divers premiums had been and were agreed upon between *Hamilton* and the plaintiffs, and were due from him to them, for divers assurances on divers ships and merchandizes, at sea and going to sea, and which assurances were made with the plaintiffs for *Hamilton*, and which premiums in the whole amounted to £5260. 1s.; yet that *Hamilton, Boyd*, or the defendant, did not, nor would, nor did nor would any or either of them,

after the making the said bond, and the condition thereof, well and truly pay, or cause to be paid, to the plaintiffs, the said premiums so agreed upon and due for such assurances so made with the plaintiffs for *Hamilton*, within six months after making such respective assurances, or at any other time whatsoever, deducting and detaining thereout for the brokerage and commission, after the rate in the bond in that behalf mentioned, according to the form and effect of the bond in that behalf, but that they and each of them wholly refused so to do, and therein failed and made default, and that there is now due and owing from *Hamilton* to the plaintiffs, for and in respect of the said premiums for such assurances so agreed upon and made as aforesaid, £1568. 10s. 6d. contrary to the form and effect of the condition of the bond in that behalf, &c.

1820.

 LONDON
 ASSURANCE
 COMPANY
 v.
 BUCKLE.

The usual writ of enquiry, to enquire the truth of the above breaches so assigned, was executed before Lord Chief Justice *Dallas*, at *Guildhall*, at the Sittings after the last *Trinity* Term, and the Jury assessed the damages sustained by the plaintiffs according to the breach assigned in that behalf at £1568. 10s. 6d. subject to the opinion of the Court on the following Case:

In the year 1811, *Hamilton*, a ship owner and broker, proposed to effect insurances with the plaintiffs, and it being customary for brokers to give security to the Company for the amount of the premiums, *Hamilton* proposed the defendant and *Boyd* as his sureties, and on that occasion the bond mentioned in the declaration, with the condition set out in the above suggestion, was entered into, and duly executed by *Hamilton*, the defendant, and *Boyd*, the other surety.

Hamilton, at various periods, between the 21st of *January*, 1811, and the 6th of *April*, 1813, both days inclusive,

1820.
LONDON
ASSURANCE
COMPANY
v.
BUCKLE.

effected sundry policies of assurance with the plaintiffs, on ships and merchandizes at sea and going to sea, and thereby from time to time became indebted to the plaintiffs for the amount of the premiums thereon, and the total amount of such premiums, including the duty on the policies, after deducting the commission of £5 per cent. amounted to £5260. 1s.

The plaintiffs, on the 28th *March*, 1814, received of *Hamilton* £1000, on account of such premiums so due to them as aforesaid; and in 1815 they received a further sum of £1000, in two payments of £500 each. Several average losses accrued on two ships insured by *Hamilton* with the plaintiffs, which were not finally adjusted until *August*, 1816, which average losses amounted together to £1019. 6s.; and being added to the before-mentioned sums of £1000, £500, and £500, amounted together to £3019. 6s., which being deducted from the said sum of £5260. 1s., the total amount of premiums, left a balance of £2240. 15s., due to the plaintiffs for such premiums of insurance.

Hamilton became bankrupt in *June*, 1816, having continued to carry on business on credit, as usual, up to the month of *March* preceding, and the plaintiffs proved the balance of £2240. 15s., under the commission, against him; and on the 29th of *April*, 1818, they received a dividend of six shillings in the pound thereon, amounting to £672. 6s.; and, after giving credit for the same, there remained a balance of £1568. 10s. 6d., due to the plaintiffs, which they sought to recover in this action.

No intimation whatever was given by the plaintiffs to the defendant of the state of the account as between the former and *Hamilton*, until the 25th of *July*, 1816. On the execution of the writ of enquiry, the account current between *Hamilton* and the plaintiffs was put in and admitted as

evidence; and the policies of insurance corresponding therewith were also produced; and, among other insurances, one on a ship called the *Batavia*, on the 7th of *January*, 1813, was effected on account of the defendant as the owner of that ship, and the sum of £650, the premium thereon, was actually paid by him to *Hamilton* as the broker effecting such insurance, on the 18th *January*, 1813.

1820.
LONDON
ASSURANCE
COMPANY
v.
BUCKLE.

The question for the opinion of the Court was, Whether the plaintiffs were entitled to recover the damages above assessed, or any part thereof? If the Court should be of opinion that they were, the verdict was to be entered for the damages so assessed, or for such other sum as they should think the plaintiffs were entitled to recover. But if the Court should be of opinion that the plaintiffs were not entitled to recover any thing, then the damages so assessed were to be reduced to one shilling. The case now came on for argument, when

Mr. Serjt. *Lens* for the plaintiffs observed, that the questions intended to be raised for the defendant were, first, whether he was not discharged by the laches of the plaintiffs, in suffering the credit of *Hamilton* to run on so long beyond the six months stipulated by the bond? secondly, whether the amount of the sums actually received by the plaintiffs, before the bankruptcy of *Hamilton*, was not to be applied in discharge of the limited engagement of the defendant for him, instead of discharging the excess beyond such engagement, and leaving the bond unsatisfied? thirdly, whether the dividend received under *Hamilton's* commission was not to be deducted out of the £2000 claimed upon the bond? and, lastly, whether the sum charged as a premium on the *Batavia* was not to be struck out of the account, being so much paid by the defendant to *Hamilton*, as his broker in that transaction. As to the two first questions there could be no doubt,

1820.

 LONDON
 ASSURANCE
 COMPANY
 v.
 BUCKLE.

as they tended to shew that the bond was discharged; and if it were so, by the laches of the plaintiffs, the defendant should have pleaded it; but by suffering judgment to go by default, he had admitted his liability as well as that the bond remained in force; and the plaintiffs therefore were entitled to recover the amount of the damages assessed for them. The same objection as the present, as to laches by the plaintiffs, was raised in the case of the *Trent Navigation Company v. Harley*(a); and it was there pleaded, and the plea was deemed bad: and the Court held, that the neglect of obligees in a bond, to look with sufficient attention into the accounts of a person in their employment, for whose fidelity they had taken security, was not such laches as would discharge the surety at law. The money received by the plaintiffs before the bankruptcy of *Hamilton* was received on a general account, and not in discharge of the bond; and the principle that a person who is indebted to another on two several accounts may, on paying in money, ascribe such payment to which account he pleases, was not applicable to the present case, as there was no specific appropriation at the time. The same principle was applicable to the third question, as to whether the dividend received under *Hamilton's* commission was not to be deducted from the £2000 claimed by the bond; for the plaintiffs proved a sum to be due to them out of the commission, for which they had given credit to *Hamilton*, and in a general account. As to whether the sum charged as a premium on the *Batavia* was to be struck out of the account, it did not appear that *Hamilton* was the broker of the defendant as well as the plaintiffs. He might have received dividends, and although he received premiums, he was not bound to pay them over to the plaintiffs until six months after the assurance. *Hamilton* therefore was not a

(a) 10 East, 34.

broker to the plaintiffs for this particular purpose; and although the premium was paid to him by the defendant, still they could not claim it until six months afterwards. Here therefore no time whatever had been given by the plaintiffs to *Hamilton* as their broker, so as to discharge the defendant as his surety. The condition of the bond remained unaltered; this therefore fell within the ordinary case: and as the plaintiffs had been guilty of no laches, they were entitled to judgment.

1820.
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 LONDON  
 ASSURANCE  
 COMPANY  
 v.  
 BUCKLE.

Mr. Serjt. *Vaughan*.—The premiums were to be paid by *Hamilton* or his sureties, within six months after the assurances were made. Those premiums therefore constituted an absolute debt, payable at a definite period. In the *Trent Navigation Company v. Harley*, the declaration stated that the principal did not pay when required. But here the debt became absolute, at the expiration of six months; and as so long a time had been given to *Hamilton* as the principal, the defendant, as his surety, was discharged; for the last insurances were effected in 1813, and the defendant was not called on to pay until more than three years afterwards. If time be given to a principal, it will have the effect of discharging his sureties, as well on an implied as an express contract; and it may here be fairly inferred, as the plaintiffs have lain by so long, that by giving time to *Hamilton* they did not intend to call on his sureties. In the *Trent Navigation Company v. Harley*, it was argued that the laches of the obligees in not calling on the principal for payment so soon as they might have done, amounted to an estoppel at law, in an action against the sureties; but that question does not arise here. In *Orme v. Young (a)* it is true that Lord Chief Justice *Gibbs* held, that the neglect of the obligee to give notice to the surety, that the principal had made default, did not discharge such surety. Still, however, bail were invari-

1820.  
  
 LONDON  
 ASSURANCE  
 COMPANY  
 v.  
 BUCKLE.

ably discharged by giving time to the principal; at all events, the defendant had a fair right to insist that the money received by the plaintiffs before *Hamilton's* bankruptcy was for the purpose of satisfying the bond; and therefore the defendant was entitled to say that those payments were made in liquidation of the bond. As to the dividend received under *Hamilton's* commission there could be no doubt whatever; but that it must be deducted from the £2000 claimed by the bond, as the plaintiffs received six shillings in the pound under that commission; and the defendant as his surety was entitled to the benefit of such dividend.

Lord Chief Justice DALLAS.—The facts of this case lie in a very narrow compass. With respect to the first or leading question, whether the defendant as surety be discharged by the laches of the plaintiffs there can be no doubt. What are the real circumstances? *Hamilton* was an insurance broker, and in the habit of effecting insurances for the plaintiffs, who required a bond to be entered into by himself and two others, as his sureties, by way of security for the payment of premiums, which should be due on his making assurances with them. This bond was conditioned, not that *Hamilton* should become immediately liable, but that the plaintiffs should not call on him until the expiration of six months, after the making the assurances. The premiums therefore did not become a debt till then; but when the six months had elapsed, they became a debt absolutely payable. No case has been referred to as applicable to the present, where a surety has been discharged by time having been given to the principal. Here, if the sureties had applied to the plaintiffs, they might have considered whether they would have proceeded against the principal or not. This appears to me to be the common case of a party becoming surety for another; and yet it has been said, that as the principal has not been called on (although time was given him to pay the premiums), at the expiration of six months, the sureties are discharged. But no case has ever decided this position,

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1820.  
LONDON  
ASSURANCE  
COMPANY  
v.  
BUCKLE.

Mr. Justice PARK was absent.

Mr. Justice BURROUGH.—There is nothing on the face of this bond to shew that time might not be given to the principal without discharging the sureties.

Mr. Justice RICHARDSON.—It has been admitted that no case has established the principle, that where the principal himself has not been called on for payment, his sureties would be discharged. As therefore, *Hamilton* was not called on for payment at the expiration of six months, I think the defendant as his surety is not discharged thereby. As to the second question, whether the monies received by the plaintiffs, before the bankruptcy of *Hamilton*, were to be applied in discharge of the limited engagement of the defendant for him, I am of opinion, that as no specific appropriation was made, it cannot be so considered. As to the third question, the plaintiffs having received a dividend under *Hamilton's* commission, I think that such dividend reduces the defendant's liability to the extent of six shillings in the pound. In *Martin v. Brecknell* (a) it was held, that the obligee of a bond given by principal and surety, conditioned for the payment of money by instalments, who had proved under a commission of bankruptcy against the principal the whole debt, and received a dividend thereon of two shillings and seven pence in the pound, might recover against the surety an instalment due, making a deduction of two shillings and

(a) 2 Maul. & Selw. 39.



1820.

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LONDON  
ASSURANCE  
COMPANY  
v.  
BUCKLE.

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1820.  
LONDON  
ASSURANCE  
COMPANY  
v.  
BUCKLE.

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(a) 2 Maul. & Selw. 39.

1820.

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LONDON  
ASSURANCE  
COMPANY  
v.  
BUCKLE.

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1820.  
LONDON  
ASSURANCE  
COMPANY  
v.  
BUCKLE.

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(a) 2 Maul. & Selw. 39.

1820.

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LONDON  
ASSURANCE  
COMPANY  
v.  
BUCKLE.

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1820.  
  
 LONDON  
 ASSURANCE  
 COMPANY  
 &  
 BUCKLE.

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(a) 2 Maul. & Selw. 39.

1890.

LONDON  
ASSURANCE  
COMPANY  
v.  
BUCKLE.

seven pence on the amount of such instalment, and the surety was not entitled to have the whole dividend applied in discharge of that instalment, but only rateably, in part payment of each instalment as it became due. As to the fourth question, I can see no difference whether the insurance was effected by *Hamilton* for the defendant or not. Under all the circumstances therefore, I am of opinion that the plaintiffs are entitled to recover.

Judgment for the plaintiffs accordingly.

Saturday,  
Jan. 29th.

PALMER, Plaintiff; MORGAN and Wife, Deforciant.

The affidavit of taking the acknowledgment of a fine, in a foreign country, must be engrossed on parchment.

MR. Serjt. *Taddy* moved that this fine might now pass, notwithstanding an objection had been raised by the officer so to do, on the ground that the affidavit of taking the acknowledgment was written on paper instead of parchment. It appeared that the acknowledgment had been taken on paper before a commissioner, at *Archangel* in *Russia*. The officer of the Court said, that he recollected an instance where the affidavit had been written on paper, and pasted on parchment, which was allowed to pass.

But, *Per Curiam*.—Even that would not be sufficient. It would be a deviation from the rule requiring the affidavit to be on parchment. All records must be on parchment; and these affidavits are clearly matters of record. The affidavit must therefore be sent back to *Archangel* to be resworn on parchment.

The learned Serjeant, therefore, took nothing by his motion (a).

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(a) See *S. P. Mander*, Demandant; *Hookney*, Tenant; *Green*, Voucher. 5 Taunt. 263. See also *Balch v. Phelps*, 3 Bos. & Pul. 366.

1880.

PEPLOE v. GALLIERS.

Thursday,  
Feb. 3d.

THIS was a *scire facias* on a judgment in replevin. The declaration of *Trinity* Term, 59th Geo. 3. (after stating that the plaintiff had taken the defendant's goods, and well avowed such taking for the arrears of rent, and that the defendant afterwards came and said that he could not deny the avowry, and confessed that the plaintiff had sustained damages to the amount of £400, besides costs,) alleged that it was considered that the defendant should take nothing by his writ, &c. and that the plaintiff should go thereof without day, &c. and that he should have a return of the goods and that he should recover against the defendant as well the damages so confessed, and also £73. 13s. 4d. for his costs, which amounted in the whole to £473. 13s. 4d. whereof the defendant was convicted, yet that execution of the said judgment still remained to be made: the defendant was ordered to be before his Majesty's Justices at *Westminster*, on, &c. to shew why the plaintiff ought not to have execution against him for the damages aforesaid, according to the form and effect of the said recovery. The *scire facias* was tested on the 24th of *May*, 59 Geo. 3., returnable on the morrow of the *Holy Trinity*, at which day the plaintiff came, and the sheriff returned that the defendant had not any thing in his bailiwick. The declaration then stated an *alias scire facias* with a like return, wherefore the plaintiff prayed execution to be adjudged to him against the defendant of the damages aforesaid.—Plea, that after the rendition of the judgment, and before the day of suing out the first writ of *scire facias*, on the judgment against the defendant so as aforesaid rendered, to wit, in *Hilary* Term, 58 Geo. 3. the plaintiff sued out a writ of *feri facias*, directed to the sheriff of *Herefordshire*, commanding him to

To a declaration in *scire facias* on a judgment in replevin, damages £473. 13s. 4d., the defendant pleaded, that before the suing out the *scire fa.*, the plaintiff sued out a *feri facias*, commanding the sheriff to levy £274. 13s. 4d.; and which writ was delivered to the sheriff, who, before the return thereof, seized and took in execution goods of the defendant to the value of £37. 13s.—Held, that such plea was bad, as it did not state that the sheriff had returned the writ. It seems also that such plea afforded no answer to the whole of the declaration, as the sum levied was only sufficient to satisfy part of the judgment, and that it was therefore bad on special demurrer.



1690.  
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 PEYTON
 v.
 GALLINER.

cause the damages aforesaid to be levied of the defendant's goods and chattels, which writ was duly indorsed, with a direction for the sheriff to levy £274. 13s. 4d.; and was afterwards delivered so indorsed to the sheriff of *Hereford*, to be executed. By virtue of which writ the said sheriff seized and took in execution divers goods and chattels of the defendant, of the value of £37. 13s., as by the writ of *fi. fa.* remaining in the Court, before his said Majesty's Justices, more fully appears.—To this plea there was a special demurrer, in which the plaintiff assigned for causes that the plea began and concluded as an answer to, and professed to answer the whole of the plaintiff's declaration, and to bar and preclude the plaintiff from having execution of all or any part of the damages; whereas in truth and in fact the plea was only an answer to so much of the declaration as related to the plaintiff's having execution of £37. 13s. in the plea mentioned, parcel of the damages aforesaid, and also that it did not sufficiently appear, nor was it expressly stated or set forth in the plea, that execution of the residue of the damages did not remain to be made to the plaintiff, and also that the taking a part of the damages in execution was no bar to the plaintiff's having his execution for the residue thereof. The defendant joined in demurrer. The cause came on for argument this day, when

Mr. Serjt. *Lawes*, in support of the demurrer, submitted, that the plea was no answer to the declaration, as in its beginning and conclusion it professed to be an answer to the whole declaration, whereas the body of the plea contained an answer to part of the declaration only, *viz.* as to so much of it as related to the plaintiff's having execution of £37. 13s. mentioned in the plea. Besides, the mere suing out a *fi. fa.* and levying part only of a sum recovered by a judgment, does not preclude the plaintiff from reviving the judgment by *scire facias*, and suing out execution thereon. No distinction can

be drawn between a *scire facias* and an action, as to whether this be a good plea or not; but the facts stated in it do not amount even to a partial satisfaction. The rule is well founded, that where a plea professes to go to the whole action, it must be co-extensive with and answer the whole. It is laid down by Lord Holt in *Weeks v. Peach* (a), where he took this difference, "that if a plea begin with an answer to the whole, but in truth the matter pleaded is only in answer to part, the whole plea is nought, and the plaintiff may demur: but that if a plea begin only as an answer to part, and is in truth but an answer to part, it is a discontinuance, and the plaintiff must not demur, but take his judgment for that, as by *nil dicit*." Here, the plea professes to be a total bar to the judgment; but the matter contained in it only amounts to a partial bar, and is not even an answer in part to the declaration. At common law, a matter of record can only be answered by matter of record. A plea of payment to an action of debt on a judgment is not good at common law, because such payment is matter *in pais*, and not of record. It is true that by the statute 4 Anne, c. 16. s. 12: the debtor may plead payment to a *scire facias* brought on a judgment; but in order to come within that statute, he must have paid all the money due upon the judgment, so that the whole of such judgment must be satisfied; and if it did not go to that extent, a plea of actual payment would not be good or sufficient. Here, however, the plea does not amount to payment, as part only was taken in execution, and the judgment therefore remains unsatisfied for the residue. There is no case where money has been levied by a sheriff where the plea has not gone much further than this. Besides, the seizure here did not alter the property, but it still remained in the possession of the defendant in execution; for in the case of *The King v. Wells and*

1620.
PEPION
v.
GALLINER

(a) 1 Salk. 172.

1829.
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 PRYOR  
 v.  
 GALLIERA.

*Allatt (a)*, Lord Chief Baron *M'Donald*, in delivering the judgment of the Court said, that property is in no sense and to no purpose in the world altered either by the delivery of the writ, or by the actual taking possession of the goods; as therefore there has been no actual payment or satisfaction of this judgment, and as it is not stated in the plea that the sheriff has returned the writ, the plaintiff's claim is in no manner defeated.

Mr. Serjt. *Lens*, *contra*.—It is suggested by the *scire facias* that the judgment was not satisfied, and the defendant has answered it in his plea, by stating, that the sheriff seized and took his goods in execution to the value of £37. 13s. Although the fruit of the levy was unproductive and insufficient to satisfy the judgment, still the plaintiff is thereby barred from taking out a second execution, or reviving the judgment by *scire facias*. But,

*Per Curiam*: The defendant has merely stated in his plea that the sheriff seized his goods and took them in execution, and has not proceeded to state that he had returned the writ. The goods might have been restored to the defendant, and on this ground the plaintiff is entitled to judgment

Judgment for the plaintiff accordingly.

HOWELL and Wife, Executrix of LLOYD v. WYKE.

1820.

Friday,  
Feb. 4th.

THIS was an action of debt on a bond, given by the defendant to the testator *Lloyd*, conditioned for the payment of £1073. 13s. 4d. The defendant was arrested on an affidavit of debt for £800 and upwards, as being the balance of principal and interest due on the bond, and bail above were put in and justified accordingly. The defendant having left this country, the plaintiffs obtained judgment against him for the sum due on the bond, and afterwards sued the bail on their recognizance.

In this Court each of the bail on a recognizance is liable to double the amount of the sum sworn to, although in the *King's Bench* it is otherwise; and this Court will not vary its practice on motion.

Mr. Serjt. *Pell*, on a former day in this Term, had obtained a rule *nisi* that, on payment of £800 to the plaintiffs, together with the costs incurred in this cause, and the costs of the action against the bail on their recognizance, all further proceedings against the bail might be stayed. The learned Serjeant contended, that the bail were entitled to this indulgence on payment of this sum, together with the costs of this cause, on the ground, that in the Court of *King's Bench*, bail on a recognizance, taken before judgment, are only answerable in the amount of the sum sworn to, and costs, whilst in this Court they are required to enter into a recognizance in double the sum sworn to; and, in an action brought against them on such recognizance, they are answerable to the amount of the debt proved against the principal.—He observed, it would be desirable that the practice of the two Courts should be made conformable to each other; and said, that by the 43 *Geo. 3. c. 46.* if the defendant, on being arrested, in this case, had paid £800 and £10 to answer the costs, he would have been entitled to his discharge; and that the bail should not be placed in a worse situation.—It is true there is no case assimilating the practice of the two Courts; but the statute of the 43 of *Geo. 3.* might put them on the same footing. [Mr. Justice *Burrough.*—This case came before me at

1820.

HOWELL

V.  
WYKE.

Chambers, and my reason for not acting there was, that I thought it matter of law, and not of practice; and I therefore wished it to be brought before the Court.]

Mr. Serjt. Cross now shewed cause, and admitted, that the rule by which the Court of *King's Bench* was governed in cases of this description was laid down in the case of *Jackson v. Hassel* (a), where it was decided that bail in an action were not liable beyond the sum sworn to, and the costs; but the object of the present motion is to assimilate the practice of this Court to that of the *King's Bench*; but the difference arises from the terms of the recognizance. In the latter Court it is wholly different in effect, and no specific terms are therein mentioned; it being, that if the defendant do not satisfy the costs and condemnation money, or render himself to prison, the bail will pay the costs and condemnation money for him; but by a rule in this Court (b) it was ordered, that "in all actions requiring bail, the defendant shall not be permitted to enter into a recognizance; but the bail shall each of them enter into a recognizance in double the sum sworn to." Before that rule, the defendant might have entered into a recognizance himself, and each of his bail was bound in the single sum only. But the recognizance in the *King's Bench* is still general and indefinite. In *Martin v. Moor* (c), the rule, as to the liability of bail is laid down, and the terms as to such liability are there included, namely, that where the recovery is for more than the bail is bound in, he is liable *pro tanto*. Besides, in this Court, the forms of the recognizance, as well as the declaration in a *scire facias*, differ materially from the *King's Bench*; and in the case of *Dahl v. Johnson* (d), the former authorities, as to the liability of bail in this Court, were referred to; and it was decided, that

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(a) 1 Doug. 330.—(b) East. Term, 36 G. 3. 1 Bos. & Pul. 330, ~~330~~  
 (c) 2 Strange, 922.—(d) 1 Bos. & Pul. 205.

1820.  
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 HOWARD
 &
 WYER.

each of the bail was separately liable for the sum recovered, to the full extent of the penalty of the recognizance, being double the amount of the sum sworn to, or indorsed on the writ under a Judge's order : and although Mr. Justice *Buller* there thought (a) that the practice of the *King's Bench* was more reasonable, still he observed, that the practice of this Court stood settled for the reasons stated by Lord Chief Justice *Eyre*, in that case (b), which were founded on the bail's entering into a recognizance for double the sum sworn to, and that they would consequently be answerable to the extent of their recognizance for the damages sustained by the plaintiff. The case of *Dahl v. Johnson* was decided more than twenty years ago, and has since been invariably followed. Besides, here, the affidavit of debt was made by one of the plaintiffs as executrix ; she, therefore, could not know the exact amount of the sum due on the bond ; and although she swore to £800 and upwards, still it appeared that £1073 was the principal sum due on the bond, together with £169 for interest.

LORD CHIEF JUSTICE DALLAS.—The ground on which this application was made was to assimilate the practice of this Court to that of the *King's Bench* ; as to the liability of bail on their recognizance. It is therefore fit that we should maturely consider whether we should lay down a new rule, or whether it varies so materially as to be absolutely necessary that it should be made conformable to that of the *King's Bench*. The principles which have governed the practice of this Court were fully considered in the case of *Dahl v. Johnson* ; and although Mr. Justice *Buller* thought the practice of the *King's Bench* more reasonable, still he observed, that as the practice of this Court stood settled, that case must be decided by it. That decision has been acted on ever since ; and it would be too much for

(a) 1 *Bos. & Pul.* 307.

(b) *Id. Ibid.*

1820.

HOWELL
v.
WYNE.

us now to alter the practice on this motion ; but whether we shall be induced to do so in future, is perhaps worthy of consideration.

Mr. Justice PARK.—Although it is singular that the practice of this Court varies so materially from that of the *King's Bench*, and it may be deserving of consideration whether it should be assimilated, still, I do not think we can do so on this application.

Mr. Justice BURROUGH.—I am of the same opinion. At all events, bail ought to be apprized of the extent of their liability ; but the former practice of this Court cannot be altered without due notice.

Mr. Justice RICHARDSON.—In this Court, bail always enter into a recognizance for double the sum sworn to, and the practice hitherto has been, that each of them is liable for the sum recovered to the full extent of the penalty of the recognizance.

Rule discharged, without Costs.

Friday,
Feb. 4th.

COLLINS, Plaintiff; BROWN and Wife, Deforciant.

A fine may be amended in which tithes were described as arising out of a rectory, by describing them as arising out of a borough and parish, in conformity to the deed to lead the uses.

MR. Serjt. *Lens* moved that this fine might be amended in conformity to the deed to lead the uses, in which tithes were described as "all the appropriate tithes of corn and grain arising, coming, and growing out of the borough and parish of *Bodmin*." In the fine they were described as arising, &c. out of the rectory of *Bodmin*, with the appurtenances, without mentioning the borough and parish.

Fiat.

A recovery, under similar circumstances, was permitted to be amended in conformity to the deed, to make a tenant to the *præcipe*.

1820.

Friday,
Feb. 4th.

WILLIAMSON, Demandant; MEGGISON, Tenant; BEAUMONT, Vouchee.

MR. Serjt. *Hullock* moved that this recovery might be amended, which was suffered in *Easter Term* last, to pass certain lands in the county of *Northumberland*—1st. by striking out the word, “and,” and inserting the names of two parishes which had been omitted; 2dly. by inserting the tolls of the market, and other tolls in the parish of *Hexham*; 3dly. by striking out the word “rectories,” and inserting “advowsons” in lieu thereof; and 4thly. by introducing two other parishes, called *St. Peter’s* and *Allonshead*, which had been entirely omitted.

If there be several palpable mistakes in a recovery, through the neglect of the attorney employed to perfect it, the Court will order him to pay the costs of its amendment: So in a fine, if one parish be inserted instead of two, by mere mistake of the attorney, the costs of the amendment must be paid by him.

Per Curiam: There has been very gross negligence by some of the parties in suffering this recovery; if it were merely a slight or single mistake, the Court would allow it to be amended in the usual manner. But in this case the costs ought not to be thrown on the party. As however there are so many palpable and negligent errors, the recovery can only be amended on the attorney’s paying the costs.

Amendment allowed accordingly.

Mr. Serjt. *Hullock* afterwards moved that a fine, an amendment of which had been permitted last Term, might be again amended, by substituting two parishes in the place of one which had been inserted by mistake. The fine, as it now stood, described *St. Mary Bishop’s Hill* the elder, and *St. Mary Bishop’s Hill* the younger, as forming but one parish, when, in fact, they were distinct from each other. As it appeared that the mistake arose from the negligence of the attorney,

The Court permitted the amendment, on his paying costs, instead of the party.

1820.

Saturday,
Feb. 5th.

WETTER and Another v. RUCKER and Another.

The plaintiffs, being foreign merchants, had a sum of money belonging to them in the hands of the defendants.

The plaintiffs also dealt with R. and Co., who resided abroad, and were indebted to them in a sum exceeding the debt due from the defendants to the plaintiffs. R. and Co. attached money in the hands of the defendants, according to the custom of London, as being the money of the plaintiffs. The attachment was tried, and a verdict recovered against the defendants, as garnishees.

Judgment was obtained, and a certificate granted by the officer of the Court, informing defendants

that judgment had been entered. On the production of the certificate by R. and Co., the defendants, as garnishees, paid the amount of the verdict by debiting the plaintiffs in the defendants' books of account, and crediting R. and Co. therewith, under an engagement that the money should be returned if the proceeding failed. The plaintiffs afterwards appeared to the action in the Mayor's Court, and put in bail, by which the attachment was dissolved.—Held, first, that this was not a compulsory payment, as by the custom it was not required to be made until after execution executed; and, secondly, that the transfer made by the defendants in their books did not amount to payment, unless the plaintiffs had directed it to be done, or had subsequently assented to it.

THIS was an action of *assumpsit*, brought to recover the sum of £481. 18s. 6d., stated to be due from the defendants to the plaintiffs. The declaration contained counts for goods sold and delivered, and the usual money counts.

At the trial of the cause before Lord Chief Justice Dallas at London, at the Sittings after the last Trinity Term, a verdict was found for the plaintiffs for the sum of £480, subject to the opinion of the Court, on the following Case:—

The plaintiffs are foreign merchants, residing in *Switzerland*, and defendants are merchants in *London*. The plaintiffs and defendants had considerable dealings previous to the 1st of *January*, 1815, at which time there was due from the defendants to the plaintiffs the sum of £481. 18s. 6d., claimed in this action. The plaintiffs also had considerable dealings with *Francis Tadens Reyer*, *Joseph Schlik*, and *Nicholas Strohlendorf*, trading at *Treiste* in *Italy*, under the firm of Messrs. *Reyer* and *Schlik*, and were indebted to *Reyer*, *Schlik*, and *Strohlendorf* in a sum exceeding the amount of the debt due from the defendants to the plaintiffs.

On the 29th of *April*, 1815, *Reyer*, *Schlik*, and *Strohlendorf*, commenced an action in the Mayor's Court of

London, against the plaintiffs in the present action; and they not appearing to the action in the Mayor's Court, *Reyer*, *Schlik*, and *Strohlendorf*, on the same day, according to the custom of *London*, attached in the hands of the present defendants the sum of £500, as the proper monies of the plaintiffs. The now defendants, (the garnishees in the attachment,) pleaded to the same on the 15th of *June*, 1815, that they, the garnishees, had not owed to, or detained from, or then owed to, or detained from, the defendants, in the action in the Mayor's Court, (the plaintiffs in this action,) the sum of £500, or any part thereof. On the 24th of *November*, 1815, the attachment was tried before the Recorder of *London*, and a verdict recovered against the garnishees, for £480. On the 29th of *November*, a judgment was obtained in the Mayor's Court, founded on such verdict, and on the 1st of *December* the usual certificate, according to the practice of the Mayor's Court, was granted by the proper officer of that Court certifying that such judgment had been obtained. On the 5th of *December*, 1815, upon the production of the certificate by the plaintiffs in the action in the Mayor's Court to the garnishees, they paid the plaintiffs in the said last mentioned action the amount of the verdict, by debiting the present plaintiffs in their books of account with the said sum of £480, and crediting *Reyer* and *Schlik* therewith. The following are copies of the entries in the defendants' books, shewing the manner in which the transfer was made:—

<p>" Drs.</p> <p>Messrs. <i>Reyer & Schlik</i>, in acct. with <i>Rucker</i> brothers.</p> <p>1815.</p> <p>Dec. 5. Credit them to <i>Wetter</i> brothers' account, page 41, 480."</p>	<p>[Crs.</p> <p>£.</p> <p>Crs.</p>
<p>" Drs.</p> <p>Messrs. <i>Wetter</i> brothers, in acct. with <i>Rucker</i> brothers.</p> <p>1815.</p> <p>Dec. 5. By balance . . £480</p>	<p>1815.</p> <p>Dec. 5. <i>Reyer & Schlik</i>, by order of the Lord } £480" Mayor's Court</p>

1820.
WETTER
v.
RUCKER.

1820.
 WETTER
 v.
 RUCKER.

The amount of the said debt was paid to *Reyer* and *Schlik*, the then plaintiffs by the present defendants, under an engagement that it should be returned if the proceeding failed, and without any execution having issued against them to compel them to do so, except the certificate stated in the appendix to the case.—It is the business of the attorney for the plaintiff in the Mayor's Court to enter satisfaction on the record; but there are not any means of compelling him to do so, which can be resorted to by the garnishees, or the defendant. On the 20th of *February*, 1816, the plaintiffs in this action, appeared to the original action against them in the Mayor's Court, and put in bail; by which proceeding, according to the custom of the city of *London*, the attachment was dissolved.—Then followed copies of the records or entries as of record, relating to the action in the Mayor's Court, between *Reyer* and *Schlik*, plaintiffs, and *Wetter* and *Co.* (the present plaintiffs), defendants, *S. Rucker* and *I. D. Rucker* (the present defendants), being garnishees.—Whereby it appeared, that on the 29th of *April*, 1806, *Reyer* and *Schlik* demanded against the plaintiffs £1000, on an account stated, and thereupon prayed the process of the Court, which was granted, whereupon it was commanded by the Court to one of their serjeants at mace, to summon the then defendants (now plaintiffs) to appear in that Court, to answer the then plaintiffs (*Reyer* and *Schlik*) in the plea aforesaid. That at the same Court, the serjeant at mace returned that the then defendants had nothing in the city whereby they could be summoned, nor were they to be found there; that at the same Court, they were called, but did not appear, and that it was there alleged by *Reyer* and *Schlik* that the garnishees, (the defendants in this action), owed to the then defendants (now plaintiffs) £500, and detained the same in their custody; that thereupon the then plaintiffs prayed process to attach the then defendants by the said £500, so being in the hands of the garnishees; so that the then defendants might appear

in that Court to answer the then plaintiffs in the plea aforesaid; whereupon it was commanded to the said serjeant at mace, that he should attach the then defendants by the said £500, so being in the custody of the garnishees, and keep the same in his custody, so that the then defendants might appear in that Court to answer the then plaintiffs in the plea aforesaid;—that afterwards, at a Court holden on the 5th of *May*, the then plaintiffs appeared, and the serjeant at mace returned, that he, by virtue of the precept on the 29th of *April*, had attached the then defendants by the said £500, so being in the custody of the garnishees; so that the then defendants might appear to answer the then plaintiffs in the plea aforesaid;—that thereupon the then defendants, although solemnly called in the same Court on four several days, that is to say, on the fifth, sixth, eighth, and ninth of *May*, did not appear, but made default on each of those days, which defaults were accordingly recorded against them;—that thereupon the then plaintiffs prayed process to warn the garnishees to appear in the Court to shew cause; whereupon it was commanded by the same Court to the said serjeant at mace that he should make known to the garnishees to appear there on the 22d of *May*, to shew cause why the then plaintiffs should not have execution of the said £500 so attached as aforesaid; at which Court the serjeant at mace returned, that he, by virtue of the said precept, had made known to the garnishees to appear there, to shew cause, and that thereupon they appeared, and had leave to imparl;—that on the 15th of *June*, the garnishees pleaded, that the then plaintiffs ought not to have execution against them of the said £500 so attached as aforesaid, because they said, that at the time of making the said attachment, or at any time since, they had not, or yet had owed to, or detained from, the then defendants, (now plaintiffs), the said £500, or any part thereof; and thereupon issue was joined;—that on the 24th of *November*, 1815, this issue came on to be tried in the said Court,

1820.

WETTER
v.
RUCKER.

1620,
 WETTER
 v.
 RUCKER.

when the Jury found, that as to £480, part of the said £500, in monies numbered, the garnishees owed to, and detained from the then defendants (now plaintiffs). And as to £20, residue of the said £500, the garnishees had not owed to and detained from the then defendants the said £20, or any part thereof :—Therefore it was considered by the said Court, that the then plaintiffs have execution of the said £480, in monies numbered, so found by the Jury as aforesaid, by pledges, &c. if the then defendants, &c. and process for the remainder, &c.

Pledges for the within-named (then) plaintiffs to restore,
 &c.] if the (then) defendants, &c. that is to say,
J. A. Rucker, Mincing-lane, Merchant.
John Rapp, Merchant, 25, Bridge-row.

The question for the opinion of the Court was, whether, under the circumstances above stated, the plaintiffs were entitled to recover from the defendants the said sum of £480 ? If the Court should be of opinion that the plaintiffs were so entitled, the verdict was to stand for that sum ; if they should be of opinion that the plaintiffs were not entitled, a nonsuit was to be entered. But either party was to be at liberty to apply to the Court to turn this case into a special verdict.

The certificate of the judgment in the Mayor's Court was stated in an appendix to the case, as follows :

" *Messrs. Sigismund Rucker, and* }
John Diedrich Rucker. }

" I do hereby certify, that judgment hath been entered against you in the Lord Mayor's Court, London, at the suit of *Francis Tadens Reyer, Joseph Schlik, and Nicholas Strohlendorf*, trading under the firm of *Reyer and Schlik*, plaintiffs, for the sum of four hundred and eighty pounds, heretofore attached in your hands, as the proper monies of *Charles August Wetter, and Wetter*

Girtanner, trading under the firm of *Brothers Wetter*, defendants, and that security hath been given by the plaintiffs in the said attachment, for restitution of the said monies, if their debt shall be disproved, according to the custom, as by the record of the said judgment, now remaining in the said Court, appears. Dated the 1st day of *December*, 1815.

1820.
WETTER
v.
RUCKER.

"*William Jones*, Plaintiff's Attorney,
Mayor's Court Office, Royal Exchange."

The case came on for argument this day, when

Mr. Serjt. *Taddy*, for the plaintiffs, observed, that the proceeding in the Mayor's Court put in by the defendants, was, on the face of it, defective, and at an end, and they could not protect themselves by such proceeding, because they did not give any notice to the plaintiffs of that suit, thereof, and because no payment had actually been made by the defendants to *Reyer* and *Schlik*; as what was done by way of payment was not done under compulsion of any process, but under an indemnity and agreement that the money should be returned if the proceedings failed, and they had failed in consequence of the plaintiff's dissolving the attachment, by putting in bail. The process was merely to compel an appearance, and by such appearance its object had been completely obtained. Two facts were necessary to furnish the defendants with a valid defence to this action, first, that they had paid the money to *Reyer* and *Schlik*, as awarded by the judgment in the foreign attachment; and secondly, that such money was paid by compulsion of law; here however it did not appear that the money was in fact ever paid, and even if it had been it was quite clear that the payment was not compulsory. The defendants merely made entries of accounts in their books, by which each party was credited and debited, and a sum due from the defendants to the plaintiffs was transferred to the credit of *Reyer* and

1829.
 WALTER
 v.
 RUCKER.

Schlik. There was no other mode of payment. The plaintiffs had no notice whatever of credit being given to *Reyer* and *Schlik* in the defendants' books, by which the sum due from the defendants to the plaintiffs was transferred. This therefore could be no payment, as it was a mere private memorandum of such a transfer to *Reyer* and *Schlik*, without the sanction of the plaintiffs. Further however it does not appear on the face of the proceedings, that any pledges were found, although by the judgment in the Mayor's Court it was awarded that the plaintiffs should have execution of the sum found by the Jury by pledges, &c. At all events, by the custom of foreign attachments, it should appear on the proceedings, that the plaintiffs had execution, and were satisfied for their debt, and an entry of such satisfaction should have been made on the record. In the *Year Books* (a) the form of the certificate is given, that the plaintiff should have judgment against the garnishee, and that he should be quit against the defendant after execution sued out by the plaintiff; that certificate is cited by Mr. Serjt. *Williams*, in a note to *Turbill's Case* (b). And in *Roberthson v. Norroy* (c), it is stated, that it was certified by *Brooke*, the Recorder, that if no execution be sued out, the plaintiff may go on with the suit below, and the defendant may sue his debtor, notwithstanding the judgment. So in *Rolle's Abridgment* (d), *Brooke* certified, that "By the custom of the foreign attachment of *London*, if *A.* sue *B.* in *London*, &c. and *C.* is indebted to *B.* in the same sum, and the said *C.* is condemned in that to *A.*, according to the custom, and judgment be given against him accordingly, still, if no execution be taken out against *C.*, *A.* may resort to have judgment and execution against *B.* his principal debtor, and *B.* may sue *C.* for his debt, notwithstanding the unexecuted judgment."— Besides, it is clear from all the precedents, that an execution

(a) 22 Edw. 4. 30. b. — (b) 1 Wms. Scaud. 67, n. 1. — (c) *Dyer*, 82. b. — (d) 1. 555. L.

and entry of satisfaction by the plaintiff are necessary to be stated on the record. This appears from *Coke's Entries* (a), where it is stated that the plaintiff had execution by the consideration of the Court, according to the tenor of the judgment, as appears by the record. So in *Vidian's Entries* (b), it was alleged that the plaintiff had execution, and was fully satisfied, as appeared by the record. In *Fisher v. Lane* (c) it was stated, that the plaintiff below came in person, and found pledges to restore, &c. and thereupon a precept was granted for him to have execution, which he had, and thereupon acknowledged himself satisfied. And in *Wentworth's System of Pleading* (d), it was alleged in a plea of foreign attachment, that the plaintiff had execution, and acknowledged to be satisfied, as appeared by the record. In *Morris v. Ludlam* (e) it was stated, that the plaintiff had execution; and in *Bohun's Privilegia Londini* (f) the plaintiff acknowledged satisfaction. It is therefore clear, both from adjudged cases and precedents, that according to the custom of foreign attachment, it must appear on the face of the proceedings that the plaintiff had execution. In *Comyn's Digest* (g) it is said, that if the defendant at any time appear and give bail to the original action, the attachment shall be discharged, though the bail be given after judgment or execution against the garnishee, if satisfaction be not entered upon the record. It therefore appears, from a review of all these authorities, that it is not only material, but absolutely necessary that it should appear on the record, that the plaintiff has had execution, and an entry of satisfaction should also be made,

Mr. Serjt. *Bosanquet*, for the defendants.—This case embraces two points, first, whether there has been a payment

(a) 141 a. — (b) 25. — (c) 3 *Wils.* 299. — (d) Vol. iii. 254. — (e) 2 *II. Bl.* 370. — (f) 2d *Edit.* 289. — (g) *Tit. At. Attachment, E.*

1820.

WETTER
v.
RUCKER.

by the defendants; and secondly, if so, whether it has been compulsory or not? As to the first, a payment made in account between the parties, is equally binding as a payment by monies numbered. Still, however, it has been insisted that the entries in the defendants books did not discharge the plaintiffs, but the former were called on to pay the sum in question to *Reyer* and *Schlik*, and it appears both from the judgment and certificate in the Mayor's Court, that they were liable so to do; and as *Reyer* and *Schlik* have accepted the transfer made in the defendants' books in satisfaction of the debt, they cannot call again on the plaintiffs for it. Neither can the defendants claim such sum back from *Reyer* and *Schlik*; for if they had sued them, it would have been a complete answer to the action for *Reyer* and *Schlik* to say, that they had received this money by a transfer in account, according to an agreement between the parties; that therefore would be a payment to *Reyer* and *Schlik*, which the defendants could not afterwards controvert. So, on the other hand, if *Reyer* and *Schlik* had sued the plaintiffs, such transfer would be a bar to their action. Still, it has been said, that there was an engagement between *Reyer* and *Schlik* and the defendants that the money should be returned by the former if the proceeding failed; and it has been further contended that the proceeding has failed, because the plaintiffs have appeared. But that is not so; for though it is true that there would have been a failure if the then defendants had appeared, given bail, and disproved the debt, yet the entering an appearance, merely has the effect of letting in the defendants instead of the garnishees. By the nature of a foreign attachment the payment was compulsory, for when a judgment has been obtained against the garnishee, execution may immediately issue, and the judgment in this case was, that it was considered by the Court that the then plaintiffs should have execution against the garnishees in monies numbered; and then followed the certificate, by which the defendants had notice that judgment had been entered up against them in the Mayor's Court, and that security had been given

by the plaintiffs in the attachment, for restitution of the monies if their debt should be disproved. At all events, therefore, the defendants had notice of a judgment having been obtained, and execution might have been sued out by the plaintiffs in the attachment whenever they pleased. If the defendants had taken no notice of the judgment and certificate, they might have been arrested; at all events, therefore, the payment was compulsory, as it was made under a legal liability. It has also been said, that it is necessary to enter satisfaction on the record, but it is stated in the case, that neither the garnishees nor the defendants can compel the plaintiffs to do so. Even if the plaintiffs in the attachment had sued out execution, and all the money had been levied on the defendants, and *Reyer* and *Schlik* had obtained full satisfaction, still the defendants would have no means of compelling satisfaction to be entered, because it is inconsistent with the practice of the Court. Besides, the original debtor may come in at any time within a year and a day, and dispute the debt on giving security, but he could not do so after satisfaction was entered up. Satisfaction therefore should not be recorded until after the expiration of a year and a day; for in *Bohun's Privilegia Londini* (a) it is said, that after judgment obtained by the plaintiff against the garnishee, the plaintiff must, before execution is awarded, find sureties, who must undertake for the plaintiff, if the defendant in the attachment shall, within a year and a day, disprove the debt demanded against him by the plaintiff;—that then the plaintiff shall restore to the defendant the money condemned in the garnishee's hands, or so much thereof as shall be disproved, or else that the sureties will do it for him, and then execution will be granted against the garnishee for the monies in his hands. If, therefore, money be obtained by the plaintiff from the garnishee, restitution of it is not to be made to him, but to the defendant, if the debt be disproved within a year and a day; and whether a garnishee pay by com-

1820.

WETTER
v.
RUCKER.

(a) 3d Edit. 258.

1820.
 WETTER
 v.
 RUCKER

pulsion or not, the sum paid cannot be returned to him, and the distinction is taken in *Bohun's Privilegia Londini* (a), that "when satisfaction is acknowledged, the attachment is perfected, so that the defendant can put in no bail to dissolve the attachment." It is therefore clear that the defendant cannot be excluded from obliging the plaintiff to find sureties for restitution of the money, if the debt should be disproved within a year and a day. As to the certificate of *Sterkey* (b) it merely declared that the plaintiff should have judgment, and the garnishee be quit against the defendant, after execution sued out by such plaintiff, but whether such execution be necessary to discharge the debt is altogether beside the present question. So *Roberthon v. Norrey* (c) only decided that the judgment should not discharge the garnishee, unless the fruits of it had been obtained, but it does not follow that execution must be sued out, for if the judgment were satisfied it would be wholly unnecessary to do so. As to the precedents cited from the different books of entries, they merely shew, that where there has been an execution it must be pleaded. It therefore appears that the defendants being originally debtors of the plaintiffs were liable to them in the first instance, and the payment in question has been made by legal compulsion. If a third person be liable to pay money for another, such payment will be a discharge, and it is not necessary to wait until an action be brought for its recovery. Here, the garnishees' liability was incurred by the process of the foreign attachment, and they would have been liable to imprisonment if they had refused to transfer the sum in question. The payment, therefore, was involuntary, and made under a legal liability, and moreover, was recognized by *Reyer* and *Schlik* in the transfer made in the defendants' book of accounts. They, as plaintiffs in the attachment, had obtained judgment, and although no execution was sued out, yet the payment to them by the defendants was made by compulsion of law; and as satisfaction could not

(a) 3d Edit. 259. — (b) 22 Edw. 4. 30. b. — (c) Dyer 82 b.

be entered up till after a year and a day, the defendants may take advantage of it, and therefore the plaintiffs cannot be entitled to recover.

1820.

 WETTER
 v.
 RUCKER.

Mr. Serjt. *Taddy* in reply.—A party need not wait a year and a day to enter satisfaction on the record, it may be done immediately; for the plaintiff in an attachment is merely to find sureties for the restitution of the money, if the debt be disproved within a year and a day. If therefore it be disproved, the satisfaction may be set aside, and that too must be done before execution is awarded. Here, the defendants have failed in both points, for they have not shewn that the money was paid, or that the plaintiffs in the attachment have had execution and satisfaction. There is no authority to shew that a party must wait a year and a day before satisfaction is entered up, and the attachment may be dissolved at any time before that period. Here, there was no award of execution, the judgment might be enforced or not, but that would not be evidence of payment. It has been said, that the defendants could not recover from *Reyer* and *Schlik*, as the proceeding has failed by the attachment being dissolved. But in point of fact there has been no payment whatever; for a mere transfer in account has never been held to amount to payment. [Mr. Justice *Park*.—In *Buller v. Harrison*(a) it was held, that if money be paid by mistake to an agent, and placed by him to the account of his principal, but not paid over;—money had and received would lie against the agent, and the mere passing such money in account, or making rest without any new credit given, fresh bills accepted, or further sum advanced for the principal, in consequence of it, is not equivalent to a payment of it over; and the Court said, that if the money had been actually paid over, it would have been a totally different question.] A mere transfer of account in the books of a debtor, without the knowledge of a creditor, cannot amount to payment, unless such creditor has been in-

(a) *Comp.* 565.

1820.

WETTER
v.
BUCKER.

formed of it, or has recognized or adopted it. All the precedents shew that execution and entry of satisfaction on the record, in a proceeding on a foreign attachment, are necessary. They must be there stated as forming part of the custom, and the garnishee cannot be discharged unless they be so. In *Bohun's Privilegia Londini* (a) the custom of foreign attachment in the Mayor's Court is set forth, and it is there stated (b) that the plaintiffs had execution according to the custom of the city. So, in all the entries, the statement of execution and entry of satisfaction are introduced on the record, as being absolutely necessary under the custom of foreign attachments.

Lord Chief Justice DALLAS.—Whatever may be the final decision of the Court in point of law, one thing is perfectly clear, that this is a proceeding which must be strictly watched, and a custom which must be rigidly pursued. What are the facts? The plaintiffs being merchants residing abroad, had money belonging to them in the hands of the defendants, resident in this country, who were also correspondents of *Reyer* and *Schlik*, who were, as well as the plaintiffs, foreign merchants. They claimed a sum of money as being due to them from the plaintiffs, and attached it in the hands of the defendants, which the latter admitted they held as belonging to the plaintiffs. The defendants had no right to examine whether the sum claimed by *Reyer* and *Schlik* was a true debt, or an unjust demand. Even if it had been a just debt, they had no right to make a voluntary payment to *Reyer* and *Schlik* with the plaintiffs' money, which was then in their hands. It has been agreed in the course of the argument, that in order for the defendants to protect themselves by a payment which they had no express, or even implied authority to make;—they must shew that it was a payment by compulsion in the strictest sense of the word, and it

(a) 3d Edit. 284. — (b) Id. 286.

cannot be so considered, but by the custom under which they claim to be protected. As to the justice of the case, it might be fairly and naturally supposed, that the plaintiffs being foreigners, and being ignorant of the laws of this country, ought to have had notice of this claim by *Reyer* and *Schlik* from the defendants, before the proceedings were suffered to go on in their absence, and further, at all events, they should have been acquainted with the fact. The case however is totally silent as to whether they had such notice or not, and it is therefore reasonable to conclude that they had not. Even if they had, and the payment had been made in consequence of such proceedings behind their backs, can it be said that they must be concluded by such payment, they being not only ignorant of its having been made, but also of the proceedings under which it is said to have been enforced? But, as I before observed, it is necessary that the defendants should have made this payment by compulsion. This point therefore involves two questions, first, whether any payment has in fact been made; and, secondly, whether it was made by compulsion; and, to go further, whether such compulsion was created by the custom which ought to have been most strictly pursued. First, was it a payment in point of fact? The plaintiffs had dealings with *Reyer* and *Schlik*, and merely transferred money in account, and did not actually part with or pay it over to them. It is unnecessary to examine whether every transfer of money in account amounts to payment or not, as here, the defendants were not bound to pay, neither had they any authority even to make a transfer in their account with the plaintiffs; but beyond that, I do not think there was any payment whatever, for the defendants have not parted with this sum, although such transfer in account has been made, but they have merely transferred it under an engagement or indemnity from *Reyer* and *Schlik*, that they would return the money if the attachment should be dissolved. This has been done, by the plaintiffs having put in bail;—*Reyer* and *Schlik* were therefore bound to repay the money to the

1820.

WETTER
v.
RUCKER.

1820.
~
WETTER
v.
BUCKER.

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(a) 3d Edit. 284. — (b) *Id.* 296.

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1820.

WETTER
v.
RUCKER.

1820.
WETTER
v.
RUCKER.

defendants, and consequently it is to be considered as money remaining in the hands of the latter, and not in *Reyer* and *Schlik*. Even, therefore, if the money had been actually paid, still, as it would have been a voluntary payment, made under an engagement that it should be repaid in case the proceeding should fail, it would not have amounted to payment. The only remaining question is, whether this be a compulsory payment; and if so, whether the custom under which the defendants claim protection has been strictly pursued. The custom is, that after execution, the parties shall be acquitted, but not after judgment. Still, however, it has been said, that there is a legal liability created in the party, against whom there has been a judgment, equivalent to an execution. If, by the custom, the payment must be made after execution, and not when judgment shall issue, it must be followed strictly. Although it may be a hardship on a plaintiff, arising from the custom, still it must be pursued, and the custom is, that the payment must follow the execution, after which satisfaction may be entered on the record. On both grounds, therefore, first, as this was not a compulsory payment, and secondly, that it did not even amount to any payment, as the money, in point of fact, still remains in the hands of the defendants, the custom not having been strictly pursued, I am of opinion that the plaintiffs are entitled to recover.

Mr. Justice PARK.—My Lord Chief Justice has entered so fully into the whole of the argument, that I need only express my entire concurrence; but I beg to observe, that I have come to the same conclusion on both the grounds stated by him, and not on the necessity of shewing that execution and entry of satisfaction must appear on the record. It is therefore only necessary to consider, whether this be a payment made in pursuance of the custom. It appears to me, that by such custom, it is not only necessary that the judgment should be that execution should issue, but that an award of execution should be actually made.

That being so, it is apparent on the face of the case, that this transfer could not amount to a payment. It could not be a compulsory payment, because there was an engagement that the money should be returned in case the proceeding should fail, which has actually happened by the plaintiffs having appeared. The rule laid down in *Buller v. Harrison (a)*, to which I before alluded, has never been doubted, but has been invariably acted upon ever since that case was decided. If the defendants here had parted with the money belonging to the plaintiffs, or a payment had been made in advance, it would shew that it was a *bonâ fide* transaction; so an absolute transfer in their books might, perhaps, be considered a payment; but it was engaged by *Reyer* and *Schlik* that the money should be returned in case of a certain event, which has happened. That, therefore, cannot amount to a payment. Has there then been a compulsory payment? Certainly not; as such payment was not required to be made until after execution. The judgment was obtained on the 24th of *November*, 1815, and the certificate was dated seven days afterwards. If, therefore, the plaintiffs had had due notice (being resident at *Hamburgh*), they might have put in bail in the mean time; but the action in the Mayor's Court was commenced in *April*, 1815, and the money was not paid by the defendants until *December* in that year; and it does not appear that the plaintiffs had any notice of the proceedings from the time the action was commenced until the payment was made. I therefore think that the plaintiffs are entitled to judgment.

Mr. Justice BURROUGH.—Independently of the objections raised to the proceedings in the foreign attachment, I am of opinion that there has been no payment in this case; for it is a well-known principle, that no person can

1820.

WETTER
v.
RUCKER.

1820.
WETTER
v.
BUCKER.

part with another man's money without his consent ; neither can this be considered as a *bonâ fide* payment, as the money was to be returned to the defendants in case the proceeding should fail ; and which, in point of fact, has been the case. If, therefore, it can be considered a payment as falling within the custom of the Mayor's Court, still such custom is of itself contrary to practice and the common law, and only prevails in the cities of *London*, *Bristol*, and *Exeter*. If the payment in question is to be supported by the custom of *London*, such custom can only be supported by statute, or something equivalent to it. It is a custom of a most extraordinary nature, and must therefore be narrowly watched ; for it is a custom to dispose of the property of individuals without their knowledge or assent. The custom, as certified by *Sterkey*, the Recorder of *London*, in the Year Books (a), is equivalent to a statute, and must now be so considered by the Court ; and by that certificate the custom was stated to be, that the plaintiff should have judgment against the garnishee, and that he should be quit against the defendant, after execution should be sued out by the plaintiff. Such a custom is good and reasonable ; because, when execution has issued, there can be no collusion, and the money is then paid to the creditor ; but such payment must be made after execution sued out by the plaintiff. The custom, therefore, is clearly expounded by the conclusion of that certificate. By the record here, it appears, that execution has never been sued out ; still, however, it has been said, that a payment made prior to it, is equivalent to one made subsequently ; but as the custom must be construed strictly, I think that this could not be considered as a payment ; and as the custom has not been pursued, I am of opinion that there has been no payment whatever, and consequently that the plaintiffs are entitled to recover.

Mr. Justice RICHARDSON.—I fully agree with the Court on both points; and first, that this is not an actual payment. In order to make it so, it must operate to discharge the person paying, and bind the party receiving. This, however, is a mere conditional payment, as it was engaged that if the proceeding failed, the transfer should be considered as amounting to nothing, and the proceeding has failed, because the plaintiffs appeared, and put in bail within a year and a day. And on proof of bail having been so put in and filed, the attachment is dissolved. It is unnecessary to consider the effect of the transfer in account in the defendants' books, as here, in point of fact, the money still continued in the hands of the defendants. As to the second question, I am also of opinion, that this was not a compulsory payment. To render it so, it must come within the meaning of the custom. There are many cases where a party may be compelled to pay, although no proceedings at law be had against him, as where a payment is made under a legal liability; but here, the payment could only be enforced by virtue of the custom, by which it appears that execution must have been previously sued out and executed. This appears to have been the custom as far back as the 22 *Edw. 4.*, and was so certified by *Sterkey*, the then Recorder of *London*. The reason that execution must be sued out and executed, appears to be very strong in favour of the custom; because it will appear on the record that payment has been actually made by the garnishee, by virtue of which the original defendant will be discharged, and enabled to defend himself against any future demand that might be made by the plaintiff. It appears too, by the case of *Roberthson v. Norroy (a)*, that a judgment on a foreign attachment is no bar to the original creditor's proceeding against his original debtor; as if judgment against the third person be not executed, the plaintiff may resort back to his principal debtor,

1820.

WETTER
v.
RUCKER.

(a) *Dyer* 82. b.

1820.
 WETTER
 v.
 RUCKER.

and may sue the garnishee, notwithstanding the judgment. Something more than a judgment is therefore required, viz. an execution executed, and that appears to me to be necessary by the custom, so as to render the payment compulsory and discharge the garnishee; otherwise, the original defendant on being sued, could only prove the original entry of judgment. Perhaps he might derive further information by referring to the books of the garnishee; but it does not appear that he could have access to them. I therefore concur with the Court in thinking, that this was not a payment by compulsion, and consequently that there must be

Judgment for the plaintiffs.

Monday,
 Feb. 7th.

WATSON v EAGLE.

On the removal of a cause from an inferior Court, by a writ of *certiorari*, the plaintiff need not file his declaration until the end of the Term after that in which the writ is returnable.

A PLAINT was levied by the plaintiff against the defendant in the Sheriff's Court at York, on the 7th of *September* last; and on the 9th of *November* following, the defendant lodged a writ of *certiorari* with the officer of that Court, who, on the 16th made a return of it into this Court. On the 26th an appearance was entered with the filacer, and a rule to declare given; and on the 29th the plaintiff's attorney was served with a notice, in which the defendant demanded a declaration. The plaintiff did not file his declaration; and the defendant obtained a judgment of *non pros*, which was signed on the 16th of *December*, and a *fieri facias* was issued against the plaintiff on the 21st of that month.

Mr. Serjt. *Hullock*, on a former day in this Term, had obtained a rule *nisi* that this judgment might be set aside for

1820.

 WATSON
 v.
 EAGLE

irregularity, on the ground that the defendant was not entitled to sign a judgment of *non pros*; as on a writ of *certiorari*, or other writ to remove causes from inferior Courts, the practice of this Court was to allow the plaintiff two Terms in which to file his declaration, the Term in which such writ was returnable being considered as one; and therefore the defendant should have waited till the end of this Term, before he gave a rule to declare. That although the defendant could not sign a *non pros* on a writ of *Habeas Corpus*, no day being given by the writ for the parties to appear in Court; still on a *certiorari* it was otherwise, a day being given, and on the return being filed, the proceedings became exactly similar to common cases, and fell within the rule, *Hil. 9 Anne, s. 3.* by which a plaintiff has liberty to the end of the next ensuing Term, to deliver his declaration to the defendant's attorney, or to leave the same in the office.

Mr. Serjt. *Blosset* now shewed cause, and having observed that the rule of *Anne* was inapplicable to the present case, was stopped by

The Court, who held that the writ of *certiorari* was merely the process to bring the party into Court, that the proceedings here were founded on the removal, on which it was necessary for the plaintiff to declare *de novo*, although the parties were at issue in the inferior court, and that this case was not an exception to the general practice of the Court, which allowed the plaintiff two Terms in which to file his declaration, the Term in which the writ is returnable being considered as one of them.

Rule absolute, without Costs.

1820.

Monday,
Feb. 7th.

ARTON and DOWSON v. BOOTH.

If one of two plaintiffs release a defendant after action brought, without the consent of the other, the Court will not set aside such release unless fraud be clearly established.

THE plaintiffs were in partnership from 1814 to 1816, which in the latter year was dissolved, and by the terms of the partnership deed, *Arton* was to receive and pay all debts due to and from the partnership, and *Dowson* was not to interfere. The defendant, previous to the dissolution, was indebted to both the plaintiffs in £8 for work done by them, and was afterwards informed by *Arton* that he alone was entitled to receive the money according to the terms of the partnership. In the month of *September* following, *Arton* requested him to pay the sum in question, which he refused, when an action was brought against him in the names of both the plaintiffs, to which he pleaded a release from *Dowson*.

Mr. Serjt. *Blosset*, on a former day in this Term, had obtained a rule *nisi*, that this plea might be set aside, and the release be delivered up to be cancelled, on the ground that it was founded on fraud, and given collusively by *Dowson* to the defendant, without the knowledge or concurrence of *Arton*, who alone was entitled to receive the money under the deed of dissolution. He relied on the case of *Legh v. Legh (a)*, where the obligor of a bond, after notice of its being assigned, took a release from the obligee, and pleaded it to an action brought by the assignee in the name of the obligee, the Court set the plea aside, and Mr. Justice *Buller* there said, "there are many cases in which the Court have set aside a release given to prejudice the real plaintiff, and if the release be fraudulent, the Court will attend to the application." And Lord Chief Justice *Eyre* observed, that "the Court had in many cases refused to allow a party to take

his legal advantage, where it had appeared to be against good faith." He also cited *Payne v. Rogers* (a), and the *dictum* of Lord *Holt* (b), where he said, that "in ejectment where the plaintiff is a mere nominal person and trustee for the lessor, if he release the action he may be committed for a contempt." So in *Mountstephen v. Brooke* (c), a plea *puis darrein continuance* of release by one of several plaintiffs was set aside without costs, on terms of indemnity, against costs being given to the plaintiffs, who had released the action, though the consent of such plaintiff had not been obtained before action brought, it appearing that no consideration had been given for the release, and that the plaintiffs sued, as trustees, for the creditors of an insolvent person. In *Doe, d. Locke v. Franklin* (d), where a landlord defrayed the costs of defending an action of ejectment in the name of an illiterate tenant, who afterwards gave a *retraxit* of the plea and confession of the action, the Court set aside the *retraxit* and *cognovit*, and let in the landlord to defend the action. So in *Hickey v. Burt* (e) it was held, that where a lessor, with the permission of a bailiff, who had made for her a distress for rent, commenced in the bailiff's name an action against the sheriff, for taking insufficient pledges; and the bailiff afterwards, without the lessor's privity, released to the sheriff, the Court set aside the release, and a plea thereof *puis darrein continuance*. Although in *Jones v. Herbert* (f) this Court held, that they would control the legal power of a co-plaintiff to release *puis darrein continuance*, on a suggestion that the other plaintiff was the party beneficially interested, on a very strong case of fraud only, and not otherwise: still however, if that case be looked at, it will be seen that the affidavits put in by the defendant were a sufficient answer to the application.

1820.

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 ANTON
 v.
 BOOTH.

(a) *Doug.* 407. *S. C.* 1 *Bos. & Pul.* 448, n. — (b) 1 *Salk.* 260. —
 (c) 1 *Chitty's Rep.* 390. — (d) 7 *Tunst.* 9. — (e) *Id.* 48. —
 (f) *Tunst.* 421.

1820.

ARTON
v.
BOOTH.

Mr. Serjt. *Lens* now shewed cause. The cases cited were inapplicable to the present. The plaintiffs were in partnership at the time the defendant's debt was contracted, and he paid the amount to one of them, who was authorised to receive it. *Legh v. Legh* and *Payne v. Rogers* were bottomed in fraud and collusion; here, however, there was no fraud; and in *Jones v. Herbert* the Court said, that where a co-plaintiff is by law competent to give a release, and they were called upon to set it aside against the law, on the ground of fraud, the plaintiff applying must make out a very strong case of fraud. That case is decisive of the present, and therefore the release given by *Dowson* to the defendant is good.

Mr. Serjt. *Blosset*, in support of his rule, was stopped by the Court.

Lord Chief Justice DALLAS.—From the facts of this case, I am of opinion that the release cannot be set aside. The defendant, previous to the partnership of the plaintiffs, dealt with *Dowson* alone, afterwards with him and *Arton*, and after the partnership was dissolved, both of them applied to him for payment. An action was brought by both in the month of *September*, pending which *Dowson* gave a release to the defendant, without the knowledge of *Arton*;—this was not fraudulent *per se*, and it appears that the defendant on receiving the release paid *Dowson* the sum due to him and his partner. It is quite clear that one plaintiff may release a cause of action brought by two, and therefore the Courts have laid it down as a leading principle, that a release may be set aside if there be fraud between the parties, but that the party applying must make out a very strong case of fraud. The defendant here knew that the plaintiffs were partners, and the action was brought in the names of both. The defendant could not then know that *Arton* alone was to receive the money under the deed of dissolution. *Dowson* afterwards applied to the defendant for

payment, and he was fully competent to settle the account. There seems to have been neither fraud nor collusion between *Dowson* and the defendant, nor is there any reason to say, that any fraud existed between *Dowson* and his partner; though his giving the release might be improper, still it is not fraudulent, and although the defendant was thereby discharged from the payment of costs, still it would not amount to a fraud, as against *Arton*. It is clear that a release may be set aside, though it be apparently good, but fraud must first be proved against it, and I am therefore of opinion that this plea must stand:

1820.

Arton
v.
Booth

Mr. Justice PARK.—I am of the same opinion. In all the cases from *Legh v. Legh* to *Jones v. Herbert* this Court has refused to interfere to set aside instruments of this description, unless fraud be clearly established, and such fraud cannot be inferred, but must be manifestly apparent.

Mr. Justice BURROUGH and Mr. Justice RICHARDSON concurring,

Rule discharged.

BUTT v. Sir NATHANIEL CONANT, Kat.

Tuesday,
Feb. 8th.

THIS was an action of trespass and false imprisonment. The declaration stated, that the defendant on the 7th of *March*, 1817, assaulted the plaintiff, and compelled him to go along divers public streets to the Public Office in *Bow Street*, and also imprisoned him in *Newgate*, and kept him there without any probable cause for one hundred days then next following, contrary to the laws and customs of this realm, publishing a libel, and require him to find bail, and in default of sureties to commit him to prison to abide his trial.

A Justice of the Peace out of sessions, before information filed, or indictment found, has jurisdiction in the first instance to issue his warrant to apprehend a party charged on oath with

1820.
BUTT
v.
CONANT.

whereby the plaintiff was not only greatly injured in body and mind, but was also greatly exposed and injured in his credit and circumstances, and during that time prevented from transacting his lawful affairs, and put to great expence for his support during his imprisonment, and in procuring his discharge. The defendant pleaded *not guilty*, whereupon issue was joined.

At the trial of the cause before Lord Chief Justice *Dallas*, at *Middlesex*, at the Sittings after *Hilary Term*, 1819, the Jury found a special verdict, which stated, that on the 5th of *March*, 1817, the plaintiff unlawfully composed and published, and caused to be stuck up, affixed, and distributed in divers public streets and places within the city and liberty of *Westminster*, in the county of *Middlesex*, and elsewhere, a certain libel, entitled


"FAIR PLAY'S A JEWEL"

and which libel was as follows:—"Whereas Lord Chief Justice *Ellenborough* (thereby meaning the Right Honorable Edward Lord *Ellenborough*, then being Chief Justice of his Majesty's Court of *King's Bench*, since deceased) has committed a robbery of £1000 upon me (meaning the plaintiff) by passing a sentence to make money, and to put the King's fines into his own pocket, instead of going into the public treasury; I do hereby placard him as a disgrace to the Bench of Judges, the society of gentlemen, and the nation at large. Signed *R. G. Butt*." (meaning the plaintiff.) And also a certain other libel, entitled

"PILLORY PILLORY!"

"*Mr. Butt*, (meaning the plaintiff,) and Lord *Castlereagh*," (thereby meaning the Right Honorable Robert Henry Lord *Castlereagh*, then and still being one of his Majesty's Privy Counsellors, and a Member of the House of Commons) and which said last mentioned libel was and is as follows:—"I (meaning the plaintiff) do hereby placard Lord *Castle-*

reagh (meaning the said *Robert Henry Lord Castlereagh*) for having stated a gross falsehood in the House of Commons, in the debate on the 11th *July*, 1814, when I was a prisoner in the *King's Bench* prison, to answer his (meaning Lord *Castlereagh's*) own purposes, in stating to the House, as reported in the *Times* newspaper of the 12th *July*, 1814, that I (meaning the plaintiff) had petitioned the government for the mercy of the crown, and upon which case the pillory sentence was taken off. My (meaning the plaintiff's) petition was to the Prince Regent to be liberated, being unjustly convicted by Lord *Ellenborough* (meaning the said *Edward Lord Ellenborough* as such Chief Justice as aforesaid) to make money of me. Signed *R. G. Butt*." (meaning the plaintiff).

1820.

 BUTT
 v.
 CONANT.

That after the composing, publishing, sticking up, affixing, and distributing of the said libels by the plaintiff, to wit, on the 6th of *March*, 1817, information thereof on the oath of divers credible witnesses was duly laid before the defendant, then and still being one of the Justices of our Lord the King, assigned to keep the peace in and for the said city and liberty of *Westminster*, in the county aforesaid; and also to hear and determine divers felonies, trespasses, and misdemeanors therein committed, on which information the defendant, as such Justice, on the day and year last aforesaid, made out and granted his certain warrant, under his hand and seal of office, for the apprehension of the plaintiff, for publishing the said libels, in order that the plaintiff might be brought before the defendant, or some other of his Majesty's Justices of the Peace, in and for the county, city, and liberty of *Westminster*, to be examined and dealt with according to law. The warrant was as follows :

Public Office, Bow Street.—To all constables and others, his Majesty's officers of the peace, whom these may concern.—These are in his Majesty's name to command you and

1820.
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 BUTT  
 v.  
 CONANT.

every of you upon sight hereof, to take and bring before me or some other of his Majesty's Justices of the Peace for *Westminster*, the body of *R. G. Butt* (the plaintiff,) of whom you shall have notice, to answer to all such matters and things as on his Majesty's behalf shall, on oath, be objected against him, (plaintiff); for that he, on the 5th of *March* instant, did publish, and cause to be published, a certain wicked, scandalous, and malicious libel, imputing the crime of robbery to *Edward Lord Ellenborough*, Lord Chief Justice of his Majesty's Court of *King's Bench*, and another wicked, scandalous, and malicious libel, imputing to *Robert Henry Lord Castlereagh*, that he had stated a gross falsehood to the House of Commons, to answer his own purposes, and to the said *Edward Lord Ellenborough*, that he had unjustly convicted the plaintiff, to make money of him, against the peace, &c." This warrant was duly signed and sealed by the defendant. That the defendant, on the 7th of *March*, 1817, caused the plaintiff to be arrested and taken into custody on the warrant for publishing the said libels, and to be brought and taken before the defendant as such Justice, to be examined and answer before him, touching and concerning the publishing the said libels by the plaintiff, to be dealt with according to law; and that on the neglect, refusal, and default of the plaintiff to find surety or sureties, to answer in due course of law, for publishing the said libels, the defendant being such Justice, by his certain other warrant under his hand and seal of office, committed the plaintiff to the custody of the keeper of his Majesty's gaol of *Newgate*, the plaintiff preferring it to any other gaol, whereto he might be committed. And thereby required the said keeper, or his deputy, to receive into his hands the body of the plaintiff, therewith sent him, charged before him, the defendant, as such Justice as aforesaid, upon oath for publishing the said libels, and him the plaintiff safely to keep in his custody for want of sureties, until the plaintiff should be discharged by due course of law, wherefore the plaintiff was accordingly committed and taken into the custody

of the said keeper, and was afterwards convicted and found guilty of the libels in due course of law.

1820.  
 ~~~~~  
 BUTT
 v.
 CONANT.

That the several acts in the declaration mentioned, and therein complained of and alleged to be trespasses, were done and committed by the defendant, under and in pursuance of the said warrants so issued and granted by him as aforesaid, and in prosecution thereof, and not otherwise; but whether or not the defendant is guilty of the said trespasses, the Jurors pray the advice of the Justices of this Court. The case now came on for argument, when

Mr. Serjt. *Faughan* for the plaintiff, having premised that the only point was, whether the facts, as stated in the special verdict, were a sufficient and legal defence to the action, observed, that it involved a most important question of constitutional law, as it affected both the liberty of the subject and the freedom of the press. Admitting the grossness of the libels, and that it might be expedient to clothe a Magistrate with the power which has been exercised by the defendant, still the question is, whether the jurisdiction he has assumed in the present instance be or be not justified by law. This will depend not on mere matter of inference or strained construction, but on some clear position or acknowledged rule of law. Such rule can only be derived either from the terms of the commission of the peace, under which Magistrates act, or by statute or the ancient common law. If it be not derived from either of these, the language of Lord *Camden*, in *Entick v. Carrington* (a) is particularly applicable, viz. that "if this is law it would be found in our books." It must be inferred, therefore, that if it is not to be found there, it is not law. First, then, as to the nature of the commission; originally, the peace was kept by persons termed Conserva-

(a) 2 Wils. 291.

1820.

BUTT

v.

CONANT.

tors, and Justices, in the first instance, had no greater authority than they. The first legislative direction was made in the 1st *Edw. 3. c. 16. (a)*, which was a mere order that the peace should be kept. From that time, however, to the 33d of *Elizabeth*, when the commission under which Magistrates now act was settled, their powers had been considerably enlarged, for in *Lambard (b)* it is said, that it was the "opinion of all the Judges (and 2 *Rich. c. 3. 9.* is cited) that Justices of the Peace had no other power at the first but only *ad pacem regis conservandam*, as appeared by the statute 1 *Edw. 3. c. 16.* But that in the very next year after, the form of their commission was enlarged, so as they had the statute of *Winton* in charge, and were both enabled to enquire of felonies and trespasses, and warranted also to arrest felons that were indicted." But no express authority was given by these commissions to Magistrates to arrest felons that were indicted, if by the common law a Conservator of the Peace had such power; and if felons had not been indicted, they had no authority whatever to arrest them. The original authority vested in Magistrates, therefore, was the mere keeping the peace, which was afterwards enlarged from time to time by various acts of Parliament. The form of the commission under which Magistrates now act was settled in *Michaelmas Term, 1590*, at a conference of all the Judges, when *Sir Christopher Wray* was Chief Justice of the *King's Bench*. That commission comprehends two branches, first, as to what Magistrates are empowered to do out of Sessions, and, secondly, in Sessions. The first assigns Magistrates out of Sessions to keep the peace, and cause all the statutes for the good thereof to be kept, and punish those who should offend against them, and

(c) By which it is provided, that for the better maintenance of the peace in every county, good and lawful men, which were no maintainers of evil or barretors, should be assigned to keep the peace.

(b) Book 1. c. 9. p. 40.

1820.

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BUTT
G.
CONANT.

cause those who should threaten any of the people as to their persons, or burning their houses, to come before them, to compel them to find security for the peace for good behaviour, and on refusal, to imprison them till they should find it. There is nothing in this branch that touches the present question, as no jurisdiction is thereby given them to interfere in cases of libel, as they are merely authorised to preserve the peace, and observe and execute all the statutes and ordinances relating thereto. As to the second branch, Magistrates in Sessions are empowered to enquire into trespasses and other misdemeanors and offences; therefore, under the term "trespasses" they have a jurisdiction over cases of libel. That has been decided in the cases of *The King v. Rispal* (a), and *The King v. Summers* (b). In the latter case, an indictment had been preferred before Justices in Sessions on a private libel, and Lord Chief Justice *Hyde* at first thought it was matter of error, but afterwards altered his opinion in conformity to those of the other three Justices, who held it to be indictable, because it tended to a breach of the peace. *Lambard*, in commenting on the commission, seems to think that the duties of Magistrates must be executed in such manner as is imported by the terms of the order itself; for he says, (c) "But even as the conservation of the Peace, and the execution of the statutes be several things, so is there in the first branch (or clause) two distinct ways or means for the effecting of the same. For the statutes are to be performed according to such prescript and order as themselves do deliver, wherein, if no power at all be expressly given to any one Justice of the Peace alone, then can he not otherwise compel the observation thereof than by admonition only, and calling upon the parties: in which behalf, if he shall not be obeyed accordingly, he is to prefer the cause at the Sessions, and to work it to a presentment upon this statute, and so by the help of his fellow Justices to hear and determine

(a) 1 *Sir W. Bl.* 368. — (b) 1 *Lev.* 139. — (c) *Book 1. c. 9. p. 46.*

1820.
 ~~~~~  
 BUTT  
 v.  
 CONANT.

Lord Coke, which, although it was dissented from by Sir Matthew Hale, still he intended to confine it to treason, felony, and actual breach of the peace, and not as to a libel, which has only a tendency to such breach; for the chapter in which Hale raises the objection, relates to felonies only (a). So in the chapter on the arrests of felons, he said (b), that "A Justice of the Peace has power to issue a warrant to apprehend a person accused of felony, though not yet indicted. That, upon which the doubt must arise to those that made a doubt of it, must certainly be the statutes of Magna Charta," and then having cited authorities, he stated that "all the weight of the question upon these was statutes to see what the law of the land was, for that, if these preparatory arrests of felons were not against the law of the land, they were not restrained by these statutes." In another passage, however, he states that (c) "whether generally a Justice of Peace out of Sessions, can issue a warrant to apprehend persons offending against a penal law, though within their cognizance, and so to bind them over to the sessions, or in default thereof to commit them, and this before indictment, seems doubtful;" and he says "these things seem to make against it, first, because some acts of Parliament particularly and expressly authorise them to it, which they would not have done if it had been otherwise lawful; and secondly, because in most cases of this nature, though the party were indicted, or an information preferred, yet the *capias* was not the first process, but a *venire facias* and *distringas*; and in cases of information no process of outlawry at all until the statute 21 Jac. 1. c. 4. gave such process in actions popular as in actions of trespass *vi et armis*." So Hawkins (d) discusses the question as to indictments for felony, and says "Inasmuch as it seems to have been the constant and allowed practice of late, to make out warrants on the suspicion of felony, before any indict-

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(a) *Hale's Pleas of the Crown*, vol. i. c. 80. — (b) *Id.* vol. ii. c. 13. page 108. — (c) *Id.* 113. — (d) *Book* ii. c. 13. s. 11.

ment hath been found against the person suspected, the same seems to be countenanced by 1 & 2 *Phil. & Mary*, c. 13. and 2 & 3 *Phil. & Mary*, c. 10. which direct in what manner persons brought before Justices on suspicion shall be examined, in order to their being committed or bailed, and that the ancient opinion that a Justice could not make out a warrant against a man for felony, who had not been before indicted, had been contradicted by constant experience;" but he goes on to state (a) that "Wherever a statute gives to any one Justice a jurisdiction over any offence, or a power to require any person to do a certain thing ordained by such statute, it impliedly gives a power to every such Justice to make out a warrant to bring before him any person accused of such offence, or compellable to do the thing ordained by such statute; for it cannot but be intended that a statute giving a person jurisdiction over an offence, doth mean also to give him the power incident to all Courts of compelling the party to come before him, and it would be to little purpose to authorise a man to require another to do a thing, if it were to be understood that the person authorized had no power to compel the party to come before him.—But it seems that anciently no one Justice could legally make out a warrant for an offence against a penal statute or other misdemeanor, cognizable only by a Sessions of two or more Justices, for that one single Justice hath no jurisdiction of such offence, and regularly those only who have jurisdiction over a cause can award process concerning it; yet the long, constant, universal, and uncontrolled practice of Justices of the Peace seems to have altered the law in this particular, and to have given them an authority in relation to such arrests not now to be disputed." But he states still further (b) that "As to the evidence on which such a warrant is to be granted, it seems probable that the practice of Justices in relation to this matter also is now become a law, and that any Justice

1820.  
 ~~~~~  
 BUTT
 v.
 CONANT.

(a) Book ii. c. 13. ss. 15. & 16. ——— (b) *Id.* s. 18.

1820,
 HUTT
 v.
 CONANT.

may justify the granting of a warrant for the arrest of any person upon strong grounds of suspicion for a felony or other misdemeanor, before any indictment hath been found against him; yet, inasmuch as Justices claim this power rather by connivance than any express warrant of law, and since the undue execution of it may prove so highly prejudicial to the reputation as well as the liberty of the party, a Justice of Peace cannot well be too tender in his proceedings of this kind, and seems to be punishable not only at the suit of the King, but also of the party grieved." *Hawkins* therefore thought that this had rather been acquired by connivance, than warranted by law, as applied even to felonies; and when he treats of misdemeanors he means those only which amount to an actual breach of the peace, and with this *Hale* also agrees; but neither of them carry the point so far as to extend it to cases of trespasses not amounting to such actual breach. In *Dalton's Justice* (a) it is said, that as to "Justices of the Peace binding over or granting a warrant against offenders upon any penal statute, to appear at the Sessions to answer to their offence, though such statute be within the power of the Justice, yet such warrant, or binding over of such offenders, may seem not warranted, unless it be specially so appointed as it is by certain statutes;" and he refers to the 5th *Eliz. c. 4. (b)*, as giving them a power to commit. There was no necessity to give them this power by statute if they possessed it before under the common law, or by virtue of their commission. So by the 29d *Eliz. c. 10*. Magistrates were empowered to examine persons offending against the Game Laws, and take a bond with sureties to appear to answer the offence at the next Sessions. This being a

(a) Chap. 169, page 576.

(b) By section 39, it is enacted, that "Justices of Peace shall have full power to hear and determine all offences that shall be committed against that statute, or against any branch thereof, as well upon indictment before them in Sessions, as upon information, action, &c. and may by virtue thereof, make process against the defendant, and award execution."

penal law, and Magistrates having a jurisdiction to execute it, there could be no necessity to give them a direct power of compelling a party to enter into a recognizance, with sureties, if it was before given by the common law; and Dalton says (a) "but such offenders ought first to be indicted, and thereupon process from the Sessions is to be awarded against them until they come in, &c." The 48th Geo. 3. c. 58. s. 1. (b) furnishes a strong inference against vesting an authority in a Magistrate to commit in a case of this description, as that statute applies only to the Judges of the *King's Bench*, who are by virtue of their commission Justices of the Peace throughout the kingdom, and therefore have all the powers with which Magistrates are invested. Why, therefore, did the Legislature deem it expedient to give those Judges a power, before information filed or indictment found, when they had it before, by virtue of the commission under which they were acting as Magistrates? With respect to the cases on this subject it has never yet been decided that a Justice of the Peace is empowered to commit a person found guilty of publishing a libel, although a Secretary of State has exercised such power. But the particular duty of a Secretary of State is to keep the King's Privy Seal, and he is also a Privy Counsellor; and it is a very different question whether he may not be authorised to exercise this power;

1820.
 ~~~~~  
 BUTT  
 v.  
 CONANT.

(a) Page 576.

(b) By which it is enacted, that "Whenever any person shall be charged with any offence for which he may be prosecuted by indictment or information in the Court of *King's Bench*, not being treason or felony, and the same shall be made appear to any Judge of the same Court by affidavit, or by certificate of an indictment, or information being filed against such person in the said Court for such offence, it shall be lawful for such Judge to issue his warrant under his hand and seal, and thereby cause such person to be apprehended and brought before him or some other Judge of the same Court, or any of his Majesty's Justices of the Peace, in order to his being bound to his Majesty with two sufficient securities, in such sum as in the warrant shall be expressed, with condition to appear in the said Court, at the time mentioned in such warrant, and to answer to all indictments or informations for any such offence."

1820.

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 BUTT  
 v.  
 CONANT.

for in the case of *The Seven Bishops* (a), who had been committed for a libel, three of the Judges were of opinion that they were entitled to be discharged under the privilege which belonged to them as Peers, it was very much discussed whether this warrant would have been legal, unless it had issued and been actually signed at the Council Board. Besides, the power of the Secretary of State is confined to seditious libels on the Government, and he is therefore under their controul. Whether he derives such power from an immediate mandate of the Crown is uncertain, but it is fit, for the dignity of the State, that he should be entrusted with it, and having so long exercised it, it cannot now perhaps be disputed or rejected.—[Mr. Justice *Burrough*. How do you distinguish a Secretary of State from a Conservator of the Peace?] He has not the same authority. The office of Secretary of State was inferior until Ambassadors were received by them from different Courts. This office has only existed since the commission of the peace was granted to Magistrates. In *Entick v. Carrington*, Lord *Camden* said (b), that “we should consider the usage of these warrants, (by a Secretary of State) since the Revolution;—if it began then, it is too modern to be law;” and the first instance of a resistance to the authority of such Secretary was in the reign of Queen *Anne*, viz. in the case of *The Queen v. Derby*; and although he has so long exercised this power, still it does not even now appear that he is authorised to do so. But the same power is by no means to be extended to a Justice of the Peace. Even the jurisdiction of the Secretary of State to commit was doubted in the case of *The Queen v. Derby* (c), where the question arose on a commitment by the Secretary of State for a libel against the Government; and it was urged there he could not, although he might in cases of treason or felony, because there was no offence on which a commitment might be made by law until indict-

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(a) 4 *State Trials*, 303.—(b) 2 *Wils.* 292.—(c) *Fortescue*, 140.

ment or presentment, but in support of his jurisdiction it was argued that it was not a commitment, but that the party was merely kept in custody in order to be examined, and that having acquiesced to such commitment he could not object. But the language of Lord Chief Justice *Parker* shews very forcibly what his opinion would be in a case of this description. He said, "The warrant is good and legal. Suppose there be an information to a Justice of Peace that one is a felon, may not he send a warrant to have him come before him? If the officer must obey the warrant (as he must) he must seize him and must secure him only for that purpose, and this is nothing more. To have him examined is a privilege, and for the benefit of an innocent man; for perhaps on the examination he may clear himself, and then he will be discharged; nay, in the case of felony, the Justice of Peace is bound to take his examination." That case, however, was applicable to a Secretary of State, and not a Justice of Peace, and it was compared to a commitment by the latter on a charge of felony, and not in a case of libel. Independently of that case, however, is that of *The King v. Wilkes* (a), which is expressly in point. There the defendant was a Member of Parliament at the time, and the ground on which he was discharged was, that he was entitled to his privilege, as a libel was not an actual breach of the peace, but merely had a tendency thereto. In Sir *Baptist Hicks's* case (b) the question was, whether a letter that was sealed and delivered to the party, containing scandalous expressions, was actionable or not; and it was held not to be so, because it was only a tendency to a breach of the peace. Lord Chief Justice *Pratt*, (afterwards Lord *Camden*) in delivering his judgment in *Wilkes's* case, after stating that the defendant was entitled to his privilege, and therefore ought to be discharged from imprisonment without bail; and

1820.

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BUTT  
v.  
CONANT.

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(a) 2 *Wils.* 151.—(b) *Hob.* 225.

1820.  
 ~~~~~  
 BUTT
 v.
 CONANT.

commenting on the case of *The Seven Bishops*, the Fourth Institute (a), and Lord Tankerville's case, said, "We are all of opinion that a libel is not a breach of the peace, it tends to the breach of the peace, and that is the utmost;" and he concluded by saying, "I cannot find that a libeller was bound to find surety of the peace in any book whatever, nor ever was in any case except one, which is that of *The Seven Bishops*, where three Judges said, that surety of the peace was required in the case of a libel. Judge Powell, the only honest man of the four Judges, dissented, and I am bold to be of his opinion, and to say, that case is not law; but it shews the miserable condition of the State at that time; upon the whole it is absurd to require surety of the peace or bail in the case of a libeller." The decision of the Court in *Wilkes' case* (b), is of the highest authority, and unless it be now over-ruled the defendant cannot be entitled to judgment, as he has exercised an unwarrantable power and authority. The case of *Entick v. Carrington* (c) is not particularly applicable to the present, as it was discussed principally on the power of a Secretary of State, which does not bear even the most distant analogy to that of a Justice of the Peace. As therefore there is nothing in the form of the commission under which a Magistrate derives an authority to commit in a case of this description, nor any act of Parliament, or decided cases conferring such a power, and there being no evidence that he can exercise such a jurisdiction by the common law of the land, which must be most clearly defined, the plaintiff is entitled to judgment. At all events the *onus* of proof is with the defendant, and as the jurisdiction he has assumed is in express derogation of the liberty of the subject, it must be established by the clearest decisions, and the most unimpeachable and irresistible authority.

(a) 25. — (b) 2 Wils. 159. — (c) Id. 275.

Mr. Serjt. *Bosanquet*, *contra*.—No distinction can be drawn in cases of libel, except as to the degree of aggravation; and it cannot be doubted but that the libels in question are of the most flagrant and aggravated nature. All the text writers concur in stating a libel to consist in a tendency to produce disturbances and breaches of the peace, and that it is therefore an offence against the peace. It has been contended however, that it does not amount to an actual breach of the peace;—but it is immaterial, for the purpose of the present question, whether it be a breach of the peace, as it is termed, in contradistinction to those offences, which are against the public peace of the realm, and greatly to the disturbance of it, or whether it has a tendency to produce such breach. Admitting that it does not amount to an actual breach of the peace, still it goes far beyond a mere misdemeanor, charged *contra pacem*, inasmuch as it is an offence against the law of the land; and there is a wide distinction to be drawn between offences against the peace, although they may not amount to an actual breach of it, and those offences which are simply misdemeanors. It is not necessary for the defendant to contend, that a Magistrate is empowered, wherever a party is subject to be indicted for nonfeasance, or any species of misdemeanor, to issue a warrant against him; it is sufficient to shew that he is authorised to issue his warrant before indictment, for an offence of this description. Libel has always been treated as an offence of great aggravation, and is cognizable by indictment, although an action may not in strictness be maintainable, as in the case of a challenge. It is true that libel was little known in early times, but whether scandal be written or oral, it is still an offence against the peace. In *Bracton* (a) there is this passage: “*Nunc autem dicendum est de minoribus, et levioribus criminibus, quæ civiliter intentantur, sicut de actionibus injuriarum*”

1829.
BUT
v.
CONANT.

(a) *De Corona*, Book iii. c. 36. fol. 155. cited 9 *Rep.* 60. (a).

1820.

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 BUTT
 v.
 CONANT.

personalibus, et pertinent ad coronam eo quod aliquando sunt contra pacem domini regis. Fit autem injuria non solum cum quis pugno percussus fuerit, verberatus, vulneratus, vel fustibus casus, verum cum ei convitium dictum fuerit, vel de eo factum carmen famosum et hujusmodi." In *Bacon's Abridgment* (a) this passage is referred to among other authorities, and it is termed *Libellus famosus seu infamatoria scriptura*; which, from its pernicious tendency, has been held a public offence at the common law, because it is productive of duels and breaches of the peace. Lord Coke, in the case *de Libellis famosis* (b) says, that "every libel which is called *Famosus libellus seu infamatoria scriptura*, is made either against a private man or a Magistrate or public person; if it be against a private man it deserves a severe punishment, for although the libel be made against one, yet it incites all those of the same family, kindred, or society to revenge, and so tends *per consequens* to quarrels and breach of the peace, and may be the cause of shedding of blood, and of great inconvenience. If it be against a Magistrate, or other public person it is a greater offence; for it concerns not only the breach of the peace, but also the scandal of government." The libels in question clearly concern a breach of the peace, and are a scandal on the government of the country. In the more modern authorities, the tendency to provoke a breach of the peace is uniformly stated to be the ground on which libel is indictable. A distinction however has been taken in respect of offences which concern a breach of the peace, although not actually so; in the one, sureties for good behaviour are required, in the other, securities for the peace; for, in the *Year Book* (c), the Treasurer of the King's Household and Sir Richard Corbet, Knt. were bound to the King *de bene gerendo*, and they went with swords and other defensible weapons openly in *Westminster Hall*, and it was held, that their

(a) Tit. *Libel*, A. — (b) 5 Rep. 125. (a). — (c) 2 Hen. 7. fol. 2 & 3. pl. 7.

recognizances were forfeited by their merely wearing arms, although there had been no affray or battery, as it tended to a breach of the peace;—because the parties bound should have demeaned themselves so as not to give cause to break the peace and put the people in fear. There are four cases in which the arrest and commitment of persons for libel have been called in question, and objected to, viz. those of *The Seven Bishops*, *The Queen v. Derby*, *The King v. Brubury (a)*, and *The King v. Wilkes*. In two of these the arrest was objected to, on the ground of privilege; and in the other two, the question turned on the authority of the person by whom the arrest was made, namely the Secretary of State. *The Seven Bishops* and *Wilkes's* case turned on privilege alone; and it was assumed throughout the whole of the argument, that if the parties had not been privileged, the arrest would have been good and legal. The first, among other points, raised the main question, whether Bishops were liable to be accused for libel, being Lords of Parliament; and in *Howell's State Trials (b)*, Lord Chief Justice *Wright* observed, in the course of the argument, that the only point to be looked at was, whether there could be a commitment of a Peer for a bare misdemeanor. In *Wilkes's* case three objections were taken, and in the two first it was not even affected to be argued, that an unprivileged person could not be arrested for a libel; on the contrary, the language of Lord Chief Justice *Pratt*, in giving judgment on the second objection, appears to have considered that he might; for it was there contended, that the libel should be fully set out in the warrant; but his Lordship said(c), “The nature of the offence of libel is well known to us, and it is such a misdemeanor as we should require good bail for;” and therefore it was unnecessary, in that case, to have set out

1820.
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 BUTT  
 v.  
 CONANT.

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(a) 8 Mod. 177.——(b) Vol. xii. 223.——(c) 2 Wils. 159.

1820.  
 BUTT  
 v.  
 CONANT.

the particular libel in the warrant. The third point in that case turned solely on the ground of privilege, but it was never attempted to be argued that a common person was not liable to be held to bail for a libel. Besides, that case has been very differently reported, and a different conclusion drawn; for, according to *Wilson*, Lord Chief Justice *Pratt* is reported to have said (a), "Upon the whole it is absurd to require sureties of the peace or bail in the case of a libeller, and therefore Mr. *Wilkes* must be discharged from his imprisonment;" but in *Howell's State Trials*, where his Lordship's judgment is stated at length, it appears that he said (b), "*Perhaps* it implies an absurdity to demand sureties of the peace from a libeller. However, what was done in the case of *The Seven Bishops* I am bold to deny was law. Upon the whole, though it should be admitted that sureties of the peace are requirable from Mr. *Wilkes*, still his privilege of Parliament will not be taken away till sureties have been demanded and refused." The cases of *The Queen v. Derby* and *The King v. Erbury*, proceeded on an objection to the particular person by whom the warrant was granted, namely, the Secretary of State; and it was contended that his authority was much inferior to that of a Justice of the Peace, because he could not administer an oath, or hold persons to bail, but it was not there attempted to be argued that a Secretary of State had any power or authority which did not belong to a Magistrate or Conservator of the Peace. In answer to the objections in the former case, it was said by the Counsel for the Crown, that if they prevailed it would make an end of all warrants of Justices of the Peace; and that the warrant there was not a commitment, but only what was necessary, in order to the defendant's being examined; and Lord Chief Justice *Parker* put the case of a Justice of the Peace granting his

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(a) 2 *Wils.* 160. — (b) Vol. xix. page 993.

warrant for felony, merely for the purpose of illustration. In the first instance, when a Magistrate issues his warrant to bring a party before him, he is merely detained in custody until he answer to an examination before such Magistrate, in order to ascertain whether bail be required or not, in default of which, if necessary, he may be eventually committed to take his trial. It has been contended, that the power of commitment is confined to actual breaches of the peace, or cases where sureties may be required, but a person may be arrested on a warrant of a Magistrate for the most trifling assault, and committed to prison if he does not find bail; but no surety of the peace can be required, because such assault has been committed. It is equally clear that there are many cases in which a Magistrate may issue his warrant and commit in the first instance, where there has been no actual breach of the peace, as for a conspiracy to levy war against the King, which, although it does not amount to treason, is the highest species of misdemeanor of which a subject can be guilty; it is a misdemeanor while it rests in conspiracy, for which a party may be committed. So in the case of a challenge, there is no actual breach of the peace, but it is an offence *contra pacem*, for which the challenger may be proceeded against either by indictment or information, and be immediately arrested and held to bail. The opinion of Lord Coke has been expressly contradicted by my Lord Hale, who plainly shews that the authority in the *Year Book*, on which the former principally relied, did not justify him in the conclusion he has drawn, that a Magistrate could not commit for felony before indictment found; for the very object of the statutes of *Philip & Mary*, was to prevent Magistrates from improperly admitting persons to bail. They recognized the practice of persons being brought before Magistrates, and then assigned them a duty which they either had neglected, or had not before, *viz.* to take an examination which was to be returned; and these statutes were passed before Lord Coke

1820.

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BUTT  
v.  
CONANT.

1020.  
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 BUTT
 v.
 CONANT.

wrote the passage in question. It has been admitted that these statutes have given Magistrates power to commit in cases of felony, but they are equally empowered to arrest and commit in cases of common assault, for Lord *Hale* does not confine himself to cases of felony, but says, that (a) "Justices of Peace may also issue their warrants within the precincts of their commission, for apprehending persons charged of crimes within the cognizance of the Sessions of the Peace, and bind them over to appear at the Sessions, and this, though the offender be not yet indicted; and therefore the opinion of Lord *Coke* (b) is too straight-laced, and if it should be received would obstruct the peace and good order of the kingdom; and the *Year Book* of 14 *Hen.* 8. 16. upon which he grounded his opinion, was no solemn resolution, but a sudden and extra-judicial opinion, and the defendant had liberty to amend his plea as to the circumstance of time, to the end that it might be judicially settled on demurrer." Since writs of *habeas corpus* were granted, no person can be arrested without a legal cause, which must be duly stated. In cases of treason, a Magistrate may commit, although it be not a proper subject for consideration at the Sessions; *a fortiori* therefore he may commit in cases of libel, for by the tenor of his commission he is assigned to keep the peace, and cause all ordinances and statutes to be kept, which are made for the conservation of the peace, and the quiet government of the people; and then follows the authority respecting enquiries at the Sessions. If, therefore, libel be an offence for which a person may be arrested before indictment, a Magistrate is the only proper person to carry such arrest into execution, and more particularly so, as he is empowered to issue his warrant for other misdemeanors. This position is fortified by *Hawkins*, who says (c), "there seems to be no doubt but, that a warrant may be lawfully

(a) Book i. c. 50, page 579. — (b) 4 *Inst.* 177. — (c) Book ii. c. 13. s. 15.

granted by any Justice of Peace for treason, felony, or *præmunire*, or any other offence against the peace, as hath been more fully shewn in another chapter." That chapter is the eighth, in which libel is expressly included among those offences over which the Sessions have jurisdiction. (a) *Dalton* is an authority to shew that a Justice of the Peace is empowered to issue his warrant in a case of this description, for, he says, in speaking of surety for good behaviour (b), that "it is of great affinity with that of the peace, and is provided chiefly for the preservation of the peace;" and he draws a distinction, and observes, that "the peace is not broken without an affray committed, battery, assault, imprisoning, or extremity of menacing;—whereas the good behaviour may be broken, and the party's recognizance forfeited, first, by the extraordinary number of people attending on the party bound; secondly, by his wearing arms or other weapons more than he hath usually done; thirdly, by using words or threatening, tending or inciting to a breach of the peace; and, fourthly, by doing any other thing which shall tend thereto, or put the people in fear, although there be no actual breach; yet (he remarks) these four last matters, as they are breaches of the good behaviour, so are they also cause to bind a man to the peace; yea, they are breaches of the peace, and a forfeiture of the recognizance." In the next chapter (c) he says, that "libellers may be bound to their good behaviour as disturbers of the peace, whether they be the contrivers, procurers, or publishers of the libel;—for such libelling and defamation tendeth to the raising quarrels and effusion of blood, and are especial means and occasions, tending and inciting generally to the breach of the peace." If, therefore, libel be an offence for which a party may be apprehended, a Magistrate may bring him before him before indictment found, for the purpose of giving security for his good

1820.

BUTT
v.
CONANT.

(a) Book ii. c. 8. s. 38. — (b) C. 123, page 408. — (c) 124, page 412.

1820.
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 BUTT  
 v.  
 CONANT.

behaviour, and commit him till he find such security. So *Dalton*, after reciting the restraining statute of 25 *Edw. 3. c. 4.* and subsequent statutes, says (a), "But yet for misdemeanors done against the King's peace (as for treason, felony, or breaking of the peace, &c.) the offenders, as well by the common law, as by divers statutes, may be arrested and imprisoned by the officers of Justice."—It has been said, however, that if usage be contrary to the principles of law, it affords no ground to alter or vary it; but in the present case such usage is neither contradictory to principle or authority, but confirmatory of both; for, as far as general terms can go, the opinions of all the text writers are, that a Magistrate has such an authority as has been exercised in the present instance. Further, however, it appears, that the practice has been consistent with the terms laid down by those writers; for by a return which was made to the House of Lords (b), on the subject of commitments for libels, it appears, that from the 3d of *Anne* (1704) to 3d *Geo. 3.* (1763) there have been, in uninterrupted succession, no less than one hundred and twenty-three commitments for various kinds of libels, only three or four of which were by Secretaries of State. But the officer was only directed to make a return when recognizances had been taken; he did not therefore make a return of other cases, which are equally applicable to the subject, but he stated that it appeared by various returns, that writs of *habeas corpus* had been granted in the case of persons who had been taken into custody, viz. charged with libels, before any indictment found, or information filed against them, but that such persons not appearing to have been admitted to bail, their cases were not included in the return; and it also appears that several persons had been taken into custody for speaking seditious words, and held to bail. This practice, however, seems not to have been acted on from the third to the 4th *Geo. 3.* That dis-

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(a) C. 170, page 582.—(b) Ordered to be printed 3d March, 1818.

continuance, perhaps, has been the only reason of any doubt having been raised on the subject, there having been but five commitments in that reign, viz. two in the third, and three subsequently, commencing with the 41st year, making up the whole 128. The case of *The King v. Kendall and Roe (a)*, is important, although it does not relate to libel, but was a commitment by the Secretary of State, for assisting an escape, and the question was, whether he was authorised to commit, or could be considered as a Conservator of the Peace; and it was held, that he might be so deemed, and the Court proceeded on the ground that his office was analogous to that of a Justice of the Peace, and consequently the latter, *ex vi termini*, must have the power to which the authority of the Secretary of State was resembled. As to the 48th Geo. 3. c. 58. being unnecessary, there may be many instances besides those of treason or felony, where a Magistrate has not a power to issue his warrant, as in cases of nonfeasance, where it would be highly improper that an indictment should be preferred, or a criminal proceeding instituted. That statute, therefore, has given an authority to the Judges of the Court of *King's Bench* to issue a warrant, not merely into the county in which they sit, but every county in *England*; but because such a power has been given them by statute, embracing every species of offence, not merely offences against the peace, but those subject to indictment or information; it cannot be said that a Magistrate has no power to hold to bail in the offence of libel, which appears to be so peculiarly within his jurisdiction.

Mr. Serjt. *Vaughan* in reply.—It has been insisted for the defendant, that libels of every description have always been treated as offences *contra pacem*, but it does not thereby follow, that they amount to a breach of the peace. It is true,

1820.

BUTT

v.

CONANT.

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(a) Skin. 596. S. C. 1 Salk. 347. 1 *Ld. Raym.* 65. 5 *Mod.* 78.



1820.  
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 BUTT
 v.
 CONANT.

that in every information or indictment on a penal law, the words "*contra pacem*" are introduced, whether the offence be attended with actual breach of the peace or not. So every breach of law is stated to have been committed *vi et armis*, but it does not therefore follow, that it was done with actual force, so as to imply a direct breach of the peace. Civilians draw a distinction as to force, and use the terms *vim simplicem*, and *vim atrocem*—and this distinction is adopted by *Lambard*, who says (a), "Our law taketh knowledge of two manners of force, whereof the one is rather intellectual than actual, and may therefore be termed a force in the consideration of law, which accounteth all that to be *vis* which is contrary to *jus*; but the other is apparent by the act itself, which always carrieth some fearful shew and matter of terror (or trouble) with it." Though libel, therefore, be *contra pacem*, still it is not tantamount to a breach of the peace. The passage cited from *Bracton* has no direct bearing on the question; for, in one of his chapters *De Corona*, after stating punishments to be inflicted on crimes of a higher nature, he says (b), "*Nunc autem dicendum est de minoribus, et levioribus criminibus, quæ civiliter intentantur sicut de actionibus injuriarum personalibus, et pertinent ad coronam eo quod aliquandò sunt contra pacem domini regis.*" He there merely treated of personal wrongs, which may be considered in a certain degree as being against the peace, where the offending party may make a civil compensation to the party injured by action, although it may also be the subject of indictment. So *Bracton*, in his next chapter (c), observes, that "*Detentio Namii pro districtione faciendâ,*" is an offence against the Crown, as it can only be enquired into in the King's Courts, or before his Majesty's Justices. He therefore is not treating strictly on the criminal law, and touching libel as a matter to be visited criminally from its

(a) Book ii. c. 4. page 140.——(b) Book iii. c. 36. fol. 155.——
 (c) Chap. 37. fol. 155.

offence against the peace. The case in 2 *Hen.* 7. (a) merely decided how the words *de bene gerendo* should be construed, and there is a wide distinction between surety of the peace and surety for good behaviour, because the peace could not be broken without an affray or battery, but a recognizance for good behaviour might be forfeited without actual breach. Here, however, the warrant issued in the first instance was not to call on the plaintiff to find sureties for good behaviour, or to keep the peace, but to enter into a recognizance, and provide sureties to answer a charge of libel. *Dalton* describes libellers as disturbers of the peace, who, as such, may be called on to enter into security for good behaviour; but there is no passage which shews that a Magistrate can compel him to find sureties for trial. The position founded by Lord *Coke* (b), on the decision in the *Year Book* (c), is warranted by the principles of the ancient law; and although it has been said, that it was a hasty decision, yet it was not made without mature deliberation; for it was argued three days, and corroborated by all the authorities, and particularly by *Broke*, who was one of the Judges at the time, and who incorporated it into his *Abridgment*; and put it as a principle of law, that a Magistrate could not make a warrant to arrest a felon before indictment found.—[Mr. Justice *Barrrough*.—By the statute of “Hue and Cry,” if a person is pursued through the country as a felon, and when apprehended, proves not to be so, those who take him are justified. Can it therefore be contended, that on that statute a person suspected of felony may be apprehended, and that a Magistrate, who is authorised to act in all cases of breach of the peace and felony, cannot do so?—A Magistrate cannot arrest for felony, unless he has grounds of suspicion, for no one shall be imprisoned without an accusation properly made. If a Magistrate had a right to apprehend a felon

1820.

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BUTT

v.

CONANT.

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(a) Fol. 2 & 3.——(b) 4 *Inst.* 177.——(c) 14 *Hen.* 8. fol. 6. pl. 3.

1820.

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 BUTT  
 v.  
 CONANT.

before the statutes of *Philip & Mary* were passed, he would also be empowered to examine without the aid of those statutes. But in this case, it was not the arrest of the Magistrate, but of the party suspecting; for Lord *Coke* says (a), that "a Justice of the Peace may make his warrant for the salvation of the peace, meaning to assist the party that knoweth or hath suspicion of the felony. But neither the constable, nor any other, can break open any house for the apprehension of the party suspected, or charged with the felony; for it is in law the arrest of the party that hath the knowledge or suspicion, who cannot break open any house, but if the door of the house be open, he may enter into the same, and arrest the party." Although the doctrine of Lord *Coke* has been dissented from by Lord *Hale*, still he intended to confine himself to crimes, such as treason, felony, or actual breach of the peace, and not as being applicable to a mere misdemeanor or libel. So Mr. Serjt. *Hawkins*, though he extends it to misdemeanors, still he has admitted that anciently the law was otherwise, for he says (b), "It seems that anciently no one Justice of Peace could legally make out a warrant for an offence against a penal statute, or other misdemeanor, cognisable only by a Sessions of two or more Justices, for that one single Justice hath no jurisdiction of such offence, and regularly those only who have a jurisdiction over a cause can award process concerning it." And he then observes, that the long and constant practice of Justices seems to have altered the law in this particular. But still it is a very controverted point, whether Justices have cognizance in a case of this description; for "The Court of *King's Bench*, in *Pitt's* case, refused to quash an indictment found at the Session of the Peace, for a libel, but ordered the defendant to demur to it if he thought fit (c)." This shews

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(a) 4 Inst. 177 & 178.—(b) Book ii. c. 13. s. 16.—(c) Book ii. c. 8. s. 33.

that it has only been of late years that libel has been cognizable at the Sessions. In the case of *The Seven Bishops*, the first objection taken for them was, that the commitment could not be justified, because it purported to be signed by certain persons who were the great officers of state, and concluded by saying, being Lords of his Majesty's Council, and there can be no doubt but that if it had been signed in the Council, it would have been sufficient, but it does not follow that Justices of the Peace would be warranted in so doing—and it was not even contended there, that an individual Privy Counsellor could commit, unless actually in Council. In *The Queen v. Derby*, the commitment was by a Secretary of State, and there is no analogy whatever between him and a Justice of the Peace. In *The King v. Eastaff* (a), the question turned on the power of a Secretary of State to commit to close custody, and exclude the Magistrates of a county from visiting the prison. But a Secretary of State can neither administer an oath, or hold to bail, but he may commit a person to what prison he pleases, and after final commitment, may have him up to be re-examined; and at all times exercise a controul over him; but a Magistrate cannot commit to close custody, but only *ad arctam custodiam*. *The King v. Erbury* turned merely on the question, whether a person committed by the Secretary of State, for a libel, and outlawed, could afterwards reverse the outlawry. As to the different reports of the case of *The King v. Wilkes*, the *State Trials* were the production of an anonymous writer, and cannot be considered so accurate or good an authority as Mr. Serjt. *Wilson*, who was not only an excellent lawyer, but heard the case discussed, and furnished the notes himself. Besides, the two reports are not inconsistent with each other; for the language of the latter is not contradicted. There it was decided, that

1820.

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BUTT  
v.  
CONANT.

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(a) 1 *Gouv's N. P. Rep.* 138.

1820.  
 ~~~~~  
 BUTT
 v.
 CONANT.

if an offence amounts merely to a tendency to a breach of the peace, the party is privileged, and if it be an actual breach he is not. That case, therefore, is precisely in point, and must govern the present. *Entick v. Carrington*, relates only to the powers of a Secretary of State, whose authority, perhaps, originated from the Licensing Act(a), which was passed with a view to repress abuses in printing seditious and treasonable libels, and by which it appears(b), that if a book was found in the possession of a printer, tending to impugn the State, it was to be taken to the Secretary of State, who exercised his power accordingly; and all the decisions as to his authority are subsequent to that statute. As to practice and usage, it has been said, that commitments for libel have been general for more than a century, and precedents have been referred to; but it is remarkable, that though there were fifty instances in the reign of Geo. 2. still there were only five in the last reign; two anterior to *Wilkes's* case, and the third after a lapse of thirty-seven years from the time of that decision; and as there is no instance of a Magistrate committing during the whole of that period, it is a strong instance to shew that that case was decisive of the present question, and of the acquiescence of the officers of the Crown to the doctrine there laid down. As, therefore, the power of a Justice of Peace or Secretary of State to commit has so long lain dormant, there is now no necessity to resume it. The liberty of the subject must be considered, and a power of this description should be watched with an eye of jealousy; for it is the natural tendency of power to enlarge itself, and therefore the Court will be cautious in fettering or diminishing such liberty, which should be pure and uncontaminated as the air in which we breathe.

Lord Chief Justice DALLAS.—Whatever may be the opinion of the Court in the result of this case, I agree with my

(a) 13 & 14 Car. 2. c. 33. — (b) Sect. 15.

Brother *Vaughan*, that it is a question of considerable magnitude, involving no doubt the essential interests of the public;—on the one hand, affecting the liberty of the subject, and on the other, those powers with which Magistrates are or ought to be invested for the maintenance of order and public peace, and therefore it is a question of this description. I, for one, am extremely happy that it has undergone the thorough investigation it has received, and able discussion bestowed on it. At the trial of the cause I myself felt no difficulty, nor entertained any doubt whatever. I stated to the Jury plainly and broadly, that my opinion was, that in point of law the defendant, as a Magistrate, had the power that he had exercised; that in point of duty he was bound to exercise it, and that it would have been a culpable dereliction of his duty if he had not done so, and therefore that the defendant was entitled to their verdict. The Jury, however, did not think fit to adopt the law as laid down by me, but withdrawing for a considerable time, they at length returned and informed me, by their Foreman, that they could not subscribe to my statement of the law, and therefore wished to find a special verdict, in order that the question at law might be submitted to the consideration of the Court, that has accordingly been done, and we have heard the verdict in question fully and most ably argued upon both sides.

1820.
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 BUTT  
 C.  
 CONANT.

It was admitted in the outset, that the libels in question were of the worst possible description, and whether they be seditious or not (if that could make any distinction), if they be not actually so, they have been admitted to border upon libels of that nature, and most undoubtedly they are of the very worst description. I need not refer to the nature of the libels, or to the situation of the parties against whom they were directed, or to the public duties which they had to exercise in their respective situations, or to the interests which the public have in the honourable and upright exercise of those duties, for it has been further ad-

1820.  
 ~~~  
 BUTT
 v.
 CONANT.

mitted, and correctly so, that whether they be libels of one description or another, viz. seditious, scandalous, infamous, impious, blasphemous, or obscene, or mere libels on a private individual, the question in every one of those cases, as far as it concerns the exercise of the authority in question, is identically the same; coming round therefore to this point, namely, has or has not a Magistrate, being a Justice of the Peace, a right to commit a party brought before him, charged on oath with the publication of a libel, if he cannot find surties to appear to answer to an indictment? With respect to the power in question, it has also been fairly admitted, that if Magistrates have not such a power, it is expedient they should have it; but to that my Brother *Vaughan* has correctly added, that this is not a question whether it is expedient that they should have such a power, but whether in point of law the power does actually exist; for that we are not here to make the law, but to expound or declare it as we find it, and therefore certainly the mere question is, whether, in point of law, there does or does not exist a power in a Justice of Peace to commit a party brought before him on a charge of libel, in default of his finding surties to answer to any indictment that may be preferred against him. How, then, is it, in point of law—and first, what has been the usage?—I do not mean to say that mere usage in every case will constitute law, but it is a primary and fundamental principle that usage is of great weight in shewing what the law is, or expounding it, if it be doubtful;—and therefore here, as in every case, in the natural and simple order and progress of enquiry, we first turn to the books or precedents, to see whether, in point of fact, the power in question, has been exercised or not. Upon this point, we have a body of evidence, such as I will venture to state was never produced in a Court of Justice, upon any previous occasion, to be applied to cases of this description, or of any other whatever—a series of instances brought forward in consequence of a solemn enquiry, the result of the search of the files of the records of the Courts

of Justice in this country, presenting no fewer than one hundred and twenty-eight instances of persons actually bailed on a commitment similar to the one in question, extending from time to time, and scattered over a period of one hundred and twenty years, as far back as the enquiry has gone, namely, from the first year of the reign of Queen Anne down to the fifty-seventh of his late Majesty. Nor are these all the instances in which there has been an exercise of this power, for the return made, is confined to the instances of persons from whom bail was actually taken. But when we consider what description of persons libellers in general are likely to be, we may and must conclude, that an infinitely greater number have been committed in the first instance for want of bail, whose cases do not appear before the Court; and though the enquiry goes no further back than the beginning of the reign of Queen Anne, the reason is explained;—for the enquiry being only directed to commence from the time of the Revolution, no earlier investigation was made, because searching the records previous to that time, might have been attended with considerable difficulty. There are innumerable instances of persons committed in cases not so culpable as libel; there are several instances of persons committed for want of bail for seditious words. If, therefore, the case rested here, I should be of opinion, if nothing were to be found in the books on the subject, if there were nothing but an uniform practice, without being resisted in any one instance for one hundred and twenty years, under the circumstances attending that usage, that such usage alone would constitute a foundation so firm for any law to stand upon, that he must be a bold man, indeed, I will venture to say a presumptuous man, who, against the exercise of such a power, and by such persons, would venture to declare law founded on such a basis, was not to be law at this day. For, let it be remembered, in a great number of cases the individuals were actually taken before the Court of King's Bench upon *habeas corpus* (the warrant of commitment stating the nature of that commit-

1820.


 Bury
 v.
 Court.

1820.
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 BUTT  
 v.  
 CONANT.

ment) and actually remanded. So that this is not merely an exercise of such a power by a Justice of the Peace, it is not a practice which has obtained and prevailed, or grown up in silence and obscurity, creeping on, if I may so express it, in a dark subterraneous passage, but going on from day to day, under the eye of those eminent and illustrious persons who have filled the highest seats in the highest Court of criminal jurisprudence in this country. Under these circumstances, it has received their sanction, nor is there to be found in the books, with the exception of a single solitary passage, (on which I may say something by and bye), a *dictum*, or a statute, or any decision which can be introduced to attack the validity of this usage, which has prevailed such a length of time. But it has been said, it goes no further back than the Revolution; to that I do not agree, but I will take it to be so for the moment, I own it is an objection of a singular nature, that when enquiries are to be made into the powers of Magistrates, when the question is touching the liberty of the subject, it is to be objected that it goes no further back than the Revolution. It was directed that no enquiry should be made previous to that period, in order that precedents might not be produced of a doubtful nature, that recourse might not be had to former times, for the purpose of establishing a tyrannous and arbitrary exercise of power. But still I agree with my Brother *Vaughan*, that if the practice had its commencement from the Revolution, if it can be shewn to have originated then for the first time, if there is no trace of its origin in the statute, nor common law, nor in the sayings of Judges from time to time, or in the decisions of Courts, then I agree with him plainly and broadly, that a usage of such a continuance, if against the first principles of constitutional law, and an evident encroachment upon the right of the subject, I would even go the length of saying, if it were of the description I have stated, and sanctioned by the expressions of one of the Judges in such a case as this, even if it were a usage existing since

the formation of *Rome*, I would not hold it to be law, and therefore the question comes round to this, whether it be a usage contrary to the fundamental principles of law. It has been said, that if it be law, it will be found in the books, and that if it be not law it will not be found there;—that is a doctrine to which I cannot accede; that is one of those many sentences in which the simplicity and solidity of truth are sacrificed to hypothesis and point. Law may exist and still not be found in the books, for that may be law, which, in point of principle, is so clear, that it never occurred to any man to question it, till a case come to draw it into doubt, and therefore silence upon the frequent and undisturbed exercise of a power is evidence that such power is legally founded, whether we find any thing relative to it in the books or not. Still however I am willing to try the legality of this usage by the text to which I am invited, and that is, whether there is or is not any thing to be found respecting the validity or invalidity of this usage in the books. It has been said it is not to be found in the statute law, nor in the common law, nor in the commission of the peace, nor in any adjudged case that has been produced, and we have been referred to a great number of cases for the purpose of disproving the existence of such a power. Some of them appear to me to have no application to the present subject, except in the manner I shall point out. I will endeavour, in the first instance, to dispose of the first case, which is that of *The Seven Bishops*. How to apply it in the manner in which my Brother *Vaughan* seems to connect it with this subject, I am utterly at a loss. It was a case that was ultimately decided on the ground of privilege of Parliament; the Seven Bishops being Peers of Parliament, it was contended they had privilege, except in cases of actual breach of the peace; and that a libel had only a tendency to, and was not an actual breach of the peace. With respect to the decision in that case, in which there is much to blame, and, in my judgment, very little to applaud, I say nothing;—but the case itself

1829.

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BUTT  
v.  
COWANT.

1829.  
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 BUTT
 v.
 CONANT.

went plainly upon the ground of distinction between those who have privilege of Parliament, and those who have not, and therefore the case itself, is to me pregnant with this inference, that if it had not been a case of persons having privilege of Parliament, but of persons similar to the present plaintiff, not having such privilege, then, even on the ground on which that decision stood, and on the principle on which the whole argument proceeded, they would not have been entitled to be discharged. In principle, therefore, that case does not apply, but the very distinction which makes it differ in point of fact, leads irresistibly to the inference, that if they who have privilege of Parliament are entitled, only because they have such privilege, to be discharged, those who have no such privilege have no right whatever. That case, therefore, appears to me to be an authority the other way. The next case was decided on the power of a Secretary of State. It has been agreed in the course of the argument that he has power to commit in case of libel, that, however, has been at different times denied, and it is a little extraordinary to see the ground on which it has been disputed. It is this, that he is not a Justice of the Peace, it being taken throughout the argument, as far as we can collect any thing negatively from the case, that he would have had a power to commit if he had been a Justice of the Peace, but not being so, he had no such power, thereby admitting by inference, that Justices of the Peace have such a power. As to *Wilkes's* case, it is of a very singular description; it was a case of privilege of Parliament; when we recollect the temper of the times, and the character of the individual, a political character, contesting the rights of the people, against every constituted right of the kingdom; if he had conceived or felt, that he, as a British subject, had had his right invaded by the attempt, can we suppose he would have resisted the power which had committed him, on the circumstance of his having privilege of Parliament, that he would not have stood on the broad ground of being a subject of the country, and have insisted that

1836.
 HURN
 &
 COOKING.

Magistrates had not a power to commit in a case of libel, it not being a breach of the peace, but only having a tendency thereto? This case therefore becomes extremely strong in my judgment, to shew that not only in his own opinion, but in the opinion of the able persons by whom he was advised; it was impossible to rest the cause on the ground that he was a subject of the country, and that Magistrates had not a power to commit in a case of libel, but it was ultimately decided on the sole and narrow ground of privilege of Parliament. So much therefore with respect to those cases which it seems to me are not similar to the present, but are pregnant with inferences in favour of the power of a Justice of the Peace, which is now claimed. I come next to that which has a more immediate reference, and a closer application to the subject. It has been said, that in the statute law, in the commission of the peace, in the fitness and reason of the thing, in the first and fundamental principles of the constitution, and in decided cases in Courts of Justice, there is no trace to be found of any authority or warrant for the exercise of such a power. First, then, with respect to the fitness and reason of the thing;—it is a most extraordinary proposition to state, that a Magistrate shall be invested with a power to bind over any person to appear to answer to an indictment found for a common assault, as for holding up a stick in a threatening posture, or giving a blow to any individual; that in that case, because it is an actual breach of the peace, he may bind over the party to answer, and that in that, which is an offence of infinitely worse description, namely, a seditious libel, stirring up all the people of the country to riot and bloodshed (because the admission goes to make no distinction between the different descriptions of libel) it is most extraordinary to maintain that a Magistrate may commit in a common assault, and yet that in the worst libel that can be stated he has no such power. There is not much of reason or fitness in such a distinction, but I admit, if the law be settled, as being against such a

1830.

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 BUTT
 v.
 COMANT.

power it would only tend to shew the great necessity there is to give it in future. What then is the law upon the subject? first let us refer to the statutes;—The earliest to be found is one which has been referred to at the bar, the 1st of *Edw. 3. c. 16.* the language of which is, “that Justices shall be assigned to keep the peace,” and so is the language of every subsequent statute. The language of their commission gives them jurisdiction over trespasses, and a trespass in strictness is a breach of the peace, but the statute in question was passed merely to create Magistrates for the due maintenance of the peace; and we find not only in the reason of the thing, but in all the books beginning with the earliest authorities, that a libel is an offence against the peace, because it has a tendency to a breach of the peace, and therefore, upon the reason of this position, and the general words of the statutes, vesting Magistrates with powers for the due maintenance of the peace, I should say, the reasonable exposition of them is, that that which is for the preservation of the peace, (and the binding a libeller over is so, because a libel has a tendency to a breach of the peace), falls within the powers given to Justices. We have been told that we must look to the authorities, and find what we can in books on this subject. Now, if the authority of *Lord Hale* and that of *Mr. Serjeant Hawkins* are to be treated as they have been in the course of the argument, we may be without any authority whatever. With respect to *Lord Hale*, it is needless to remind those whom I am now addressing, what was the general character for learning and legal knowledge of that person as to the criminal law, of whom it was said that that which was not known by him was not known by any other person, and that what he knew he knew better than any other person who preceded or followed him. With respect to *Mr. Serjeant Hawkins* we know his authority. The books of both these writers are in the head and hand of every lawyer, and constantly referred to on every occasion of this sort. I must therefore look to these books, and

shall proceed to examine the exposition given by the text writers on the words of those statutes, and the Commission of the Peace, which goes to the origin of the authority resulting from the creation of the office of Magistrate. First, then, let us examine what is said on this subject by Mr. Serjt. *Hawkins*(a): "As to the eighth point, *viz.* What authority Justices of Peace have in relation to inferior offences. It would be endless to enumerate all the offences within their jurisdiction, concerning which there have been such great numbers of statutes, and therefore I shall content myself in this place with observing, that by the above-mentioned statutes of the 34 *Edw. 3. c. 1*, and also by the express words of their commission,"—(here then we have under our consideration the express words of the statute, and of the commission)—"they are empowered to hear and determine all trespasses, which is a word of a very general extent, and in a large sense, not only comprehends all inferior offences, which are properly and directly against the peace, as assaults and batteries, and such like, but also all others which are so only by construction."—Distinguishing, therefore, between that which is an actual breach of the peace, and that which is by construction a breach of the peace, and going directly, as I shall presently shew, to the case of libel, which is to be taken not as an actual, but a constructive breach of the peace, in having a tendency to such breach, and that which has a tendency only, of course, being no actual breach of the peace, he proceeds to say,—"Yet it hath been of late settled, that Justices of Peace have no jurisdiction over forgery or perjury, at the common law, the principal reason of which resolution was, that inasmuch as the chief end of the institution of the office of these Justices, was for the preservation of the peace against personal wrongs and open violence, and the word 'trespass,' in its most proper and na-

1820
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 BUTT  
 v.  
 CONANT

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(a) Book II. c. 8. s. 38.

1820.  
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 BUTT
 v.
 CONANT.

tural sense, is taken for such kind of injuries, it shall be understood in that sense only in the said statute and commission, or at the most, to extend to such other offences only, as have a direct and immediate tendency to cause such breaches of the peace, as libels, and such like." The word 'trespass,' then, according to Mr. Serjt. *Hawkins*, and the authorities which are referred to in the margin of his *Treatise*, does not imply (involved so as to be narrowed and confined to them) cases which are actual breaches of the peace; but trespass, in its largest legal signification, extends to all cases which are against the peace; and it has been admitted at the bar, that whether a libel be an actual breach of the peace or not, it is a crime or offence against the peace. In the words, therefore, of the statutes, and the commission itself, the word 'trespass' has this large signification belonging to it, so as to involve most undoubtedly the case of libel. What is a Magistrate to do in a case of this description of libel, which, if not seditious, was of the worst possible tendency? The plaintiff was brought by a warrant before the defendant, a Magistrate; the charge was established upon oath, and information regularly given, and therefore upon that, it being an offence, as I have stated, within the jurisdiction of the Magistrate, he was bound, in the first instance, upon the receiving of such information, to grant a warrant. Now let us consider what was the effect and operation of the warrant in cases similar to the present. (a) "Arrests, by the command of Justices of Peace, as such, are either by parol or by warrant: and first, as to such arrests by parol, it seems that any such Justice may lawfully, by word of mouth, authorise any one to arrest another, who shall be guilty of any actual breach of the peace in his presence, or shall be engaged in a riot in his absence. As to such arrests by the warrant of a Justice of Peace, I shall endeavour to shew in what cases a warrant for such an arrest may lawfully be made

(a) *Hawkins's Pl. Cr. Book* ii. c. 13. ss. 14, 15.

1820.

~
 BUTT
 v.
 CONANT.

by such a Justice—in what form it ought to be made, and how it is to be executed. As to the first point, I shall consider for what offences such a warrant may be granted, and upon what evidence. And first, as to the offences for which such a warrant may be granted, there seems to be no doubt but that it may be lawfully granted by any Justice of Peace, for treason, felony, or *præmunire*, or any other offence against the peace.” This alone appears to me to be decisive of the present question. If this be law, the Magistrate having jurisdiction over a libel, as an offence against the peace, and being bound to grant his warrant to apprehend the person charged with such an offence, the warrant was in the first instance legally granted. What was the Magistrate then to do? Was he to grant a warrant merely to bring the offender before him, in order to discharge him when he arrived there under virtue of such warrant? And what could he do but discharge him, unless he was authorised to bind him over to appear to an indictment, in case he refused or neglected to find sureties for that purpose, and more particularly so, when it has been admitted throughout the argument, as it must be, that trespasses include offences against the peace, and that libel is an offence of that nature, and that the Magistrate was bound to issue his warrant on information on oath, to bring the party before him? It therefore appears to me, that on the appearance of the party, in pursuance of that warrant, the Magistrate was bound to commit him, unless he found proper sureties, otherwise the warrant would have been merely granted to discharge the party as soon as he was brought before the Magistrate. It seems to me, therefore, in this view of the case, that there could be no doubt of the legality of the warrant, or the power of the Magistrate; but it is said by Mr. Serjt. *Hawkins* (a), “That anciently no one Justice of Peace could legally make out a warrant for

(a) *Pl. Cr.* Book ii. c. 13. s. 16.

1820.

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BUTT

v.

CONANT.

an offence against a penal statute, or other misdemeanor cognizable only by a Sessions of two or more Justices, for that one single Justice of Peace has no jurisdiction of such offence, and regularly, those only who have jurisdiction over a cause can award process concerning it:—yet the long, constant, universal, and uncontrolled practice of Justices of Peace seems to have altered the law in this particular, and to have given them an authority in relation to such arrests not now to be disputed.” And then, in a subsequent part of the same chapter (a), he adds, “As to the evidence on which such a warrant is to be granted, it seems probable, that the practice of Justices of Peace in relation to this matter also, is now become a law, and that any Justice of Peace may justify the granting of a warrant for the arrest of any person upon strong grounds of suspicion for a felony, or other misdemeanor, before any indictment has been found against him.” It is therefore quite clear, according to the authority of Mr. Serjt. *Hawkins*, that whether an indictment be found against the party or not, if it be an offence against the peace, over which the Magistrate has jurisdiction, he has power to grant a warrant against him, and to commit him for trial. This appears to me a direct authority, and is decisive of the present question, if no other could be found, unless we are to reject the authority of the writer. Still, however, following the same course, the next authority to which I shall refer is my Lord *Hale*, and the passage in question is this (b): “Justices of Peace may also issue their warrants within the precincts of their commission, for apprehending persons charged of crimes within the cognizance of the Sessions of the Peace, and bind them over to appear at the Sessions, and this though the offender be not yet indicted.” This, it has been all but admitted, is the authority of Sir *Matthew Hale* directly in

(a) Book ii. c. 13. s. 18. — (b) *Pl. Cr.* Book i. c. 50. p. 579.

point to the present purpose. Let us see how it has been endeavoured to be evaded. It has been said, that his Lordship is treating of felonies: so undoubtedly he is; but he is treating of felonies in legal language, and in the course of that treatise he is also speaking incidentally of general jurisdiction, and the jurisdiction of Justices of the Peace, and therefore, in describing the jurisdiction of such Justices, he says, that "they have a right to issue their warrants within the precincts of their commission, for apprehending persons charged of crimes within the cognizance of the Sessions of the Peace." And it has been fully admitted, that a libel is within the cognizance of the Sessions of the Peace, for it cannot be disputed, but that every libel is so. Magistrates, therefore, have cognizance at the Sessions of the Peace over an offence of this description; and according to Lord Hale, they have so not merely in Sessions, but before indictment found. It has been said, however, notwithstanding this, that the word to be found in this passage, is the word "*crimes*." In point of law, there is no distinction between crimes and misdemeanors; there may be in popular signification, and there undoubtedly is; but it is only necessary to look into the very first pages of the fourth volume of *Blackstone's Commentaries*, where he treats of Public Wrongs, and where the very doctrine I am now stating is to be found. His words are (a), "A crime or misdemeanor, is an act committed, or omitted, in violation of a public law, either forbidding or commanding it. This general definition comprehends both crimes and misdemeanors, which, properly speaking, are mere synonymous terms, though in common usage the word '*crimes*' is made to denote such offences as are of a deeper and more atrocious die; while smaller faults, and omissions of less consequence, are comprised under the gentler names of misdemeanors only." When, therefore, I find Sir *Matthew Hale*

1820.

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 BUTT
 v.
 CONANT,

1620.

 BUTT
 v.
 CONANT.

describing the jurisdiction of Justices of the Peace, not merely confined to discussing any particular offence, but meaning to describe as largely as possible that jurisdiction, I take him to use the most extensive word "*crimes*," as being synonymous with and comprehending "*misdemeanors*." But not only in this passage, but in every other on the subject, his opinion was, that Justices of the Peace have the power to commit before indictment found, in all cases within the cognizance of the Sessions. But the authority of Lord Coke has been mentioned, and strenuously relied on, who is, upon all cases of this description, I will not say to be disregarded altogether, but certainly to be dissented from. It has been so said most expressly by Sir Matthew Hale, upon the very occasion, and therefore, he adds (a), "The opinion of my Lord Coke (b) is too strait laced in this case, and if it should be received, would obstruct the peace and good order of the kingdom." But my Brother Vaughan has observed, that the words of Lord Hale are, "and the book of 14 Hen. 8. 16, upon which he grounded his opinion, was no solemn resolution, but a sudden and extrajudicial opinion, and the defendant had liberty to amend his plea as to the circumstance of time, to the end it might be judicially settled by demurrer, which was never done." Whether Lord Hale was right or wrong in this statement (but I take him to be clearly right), it would make no difference whatever, because it would go to that point merely;—as it has been agreed, that on an actual breach of the peace, every Justice of the Peace has not only the power to commit, but is bound to commit a party, so that he may appear to an indictment when found; and yet the doctrine of Lord Coke goes to this, that no man ought to be committed for felony or misdemeanor before indictment found, and therefore the whole of the doctrine of Lord Coke is inconsistent with Magistrates having the power

(a) Book l. c. 50. p. 579.——(b) 4 Inst. p. 177.

to commit in some cases, he being of opinion that they cannot commit in any case before indictment found. It appears, therefore, to me, that upon the authority of Lord *Hale*, and from the passages I have referred to from Mr. Serjt. *Hawkins*, there can be no doubt but that the offence of libel is within the jurisdiction of Justices of the Peace, and being within their jurisdiction, they are empowered and bound to bring parties charged with it before them; and it follows of necessity, that, in default of sureties, they are bound to commit. Further, however, in Mr. Justice *Blackstone's* fourth book of *Commentaries*, there is a chapter of which the title is distinctly this (a), "Of Offences against the Public Peace," and after specifying some, he goes on to state (b), "Besides actual breaches of the peace, any thing that tends to provoke or excite others to break it, is an offence of the same denomination;" and then, after shewing how challenges to fight are punishable, he puts the case of libels, of which he says (c), "the direct tendency is the breach of the public peace, by stirring up the objects of them to revenge, and perhaps to bloodshed:"—There are a great number of other cases which I will not comment on. There is an almost endless detail and variety that may be found, in which it is laid down in the argument at the bar, and the decisions of Judges, that a libel, of whatever nature it may be, is an offence against the peace. On the whole, therefore, it seems to me, that even if this were a usage against all reason and principle, and inconsistent with the essential and fundamental rights of the subject, it need only be brought forward in a Court of Justice to receive the reprobation it merits; but when, as connected with the usage, I refer to all the arguments, the fitness of the thing, the words of the commission of the peace, and the words of the statutes giving a power to Magistrates, together with the luminous

1820.

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 BUTT
 v.
 CORANT.

(a) Cap. xi.——(b) Sect. 12. p. 150.——(c) Sect. 13. p. 150.

1820.
 ~~~~~  
 BUTT  
 v.  
 CONANT.

exposition of the most learned text writers on the subject, followed by the universal practice of Courts of Justice for one hundred and twenty years, without a single decision denying its existence, without a single *dictum* but that which was extrajudicial, and applied to a different subject, can any one hesitate for a moment in saying, that, if in any case, by principle, by decision, or by practice, the law can be settled as clearly founded and established, it is so in this case? It is my opinion, that it is so beyond all doubt. I rejoice that it is so settled, both for the credit of our Courts in times past, and for the maintenance of peace and good order in times to come.

Mr. Justice PARK.—This case has been stated from the Bench, and frequently at the Bar in the course of the argument, to be one of considerable importance. It may therefore be possibly expected, that each Judge should give his individual opinion, if not, I declare most unfeignedly and sincerely, I should be most satisfied in reposing under the clear and luminous judgment so ably pronounced by my Lord Chief Justice, because I fear, that in endeavouring to put the ideas I have formed on the subject in language of my own, I shall only weaken the decision just delivered. At the same time, however, I will add a few words, because otherwise, it might not be supposed that I concur in what has been said, and there is this consolation at least the Court will have upon the subject, that they are greatly indebted to my two very learned Brothers, who have argued this case at the Bar, because, if any thing be overlooked by the Court, no fault will be attributable to them.

My Brother *Vaughan* has certainly referred to a great number of the ancient statutes, on which it was supposed, and justly said, that the commission of the peace was founded; but there is one statute which he either did not happen

to meet with, or he might have overlooked it, and which has been supposed to be the foundation of the original commission, though the present was formed, as it now appears, in the reign of *Elizabeth*, I mean the statute of 34 *Edw. 3.* (a), by which power is to be given to Justices of the Peace "to restrain offenders, rioters, and all other barretors, and to pursue, arrest, take, and chastise them, according to their trespass or offence." These are most general words. And again, in another part of the same statute, it is said, "And they are to take and arrest all those that they may find by indictment or by *suspicion*," (that must necessarily allude to what is to be done before indictment), "and to put them in prison;" and in another branch they are empowered "to take of all them that be not of good fame, where they shall be found, sufficient surety and mainprise of their good behaviour towards the King and his people." It therefore appears to me, that this statute requires Justices of Peace to take and arrest offenders, and if they take and arrest them, and they do not give bail, what are they to do with them? Are they to set them at large to repeat their offences? These words of the statute are therefore sufficient for the purpose of comprehending libels, and enabling Justices to take bail; and certainly all the best text writers entertained the same opinion. A libel most clearly has a tendency to a breach of the peace; and the passage in *Hawkins*, which I shall not repeat, shews that this is one of the cases in which they are empowered to act. I do not think the passage quoted from *Bracton*, by my Brother *Bosanquet*, is quite immaterial—it does not go the length of shewing whether libel was aailable offence or not, but it shews with what classes of offences it was to be ranked, and that libels, whether seditious or not, (for that makes no distinction) and that even words against an individual were an injury, for it is there said (b), that "*Cum ei convitium dictum fuerit, vel*

1820.

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BUTT

v.

CONANT.

(a) Cap. 1. ————— (b) Book iii. c. 36. folio 153.

1820.

BUTT
v.

CONANT.

bind him over to the Assizes or Sessions, because it must be the proper suspicion of *A.* himself, and *A.* may arrest him upon the force of his own suspicion, but not by warrant of the Justice. I think the law is not so, and the constant practice in all places hath obtained against it, and it would be pernicious to the kingdom if it should be as he delivers it, for malefactors would escape unexamined and undiscovered; for a man may have a probable and strong presumption of the guilt of a person, whom he yet cannot positively swear to be guilty." That appears to me to be the good sense and reason of the case, and my Lord *Hale* therefore has certainly the best of the argument. Four cases have been referred to on this subject. The first, *The Queen v. Derby* (a). It has been insisted by my Brother *Vaughan*, that there, the warrant was merely to bring a party up to be examined; but it was a warrant from the Secretary of State, and the question was, whether he, by virtue of his office, could commit for a libel, and not whether a Justice of Peace was empowered to do so. So, in the case of *The King v. Kendal* and *Roe* (b), the main point was not whether a Justice of the Peace had a right to apprehend for a libel, but whether the Secretary of State had such right. In the former case, Lord Chief Justice *Parker*, in delivering his judgment, said, "The defendant cannot be discharged: the warrant is good and legal." And Mr. Justice *Eyre* said, "A Secretary of State has a power to issue a warrant." Therefore I infer, that nobody seems to have doubted that a Justice of the Peace might do so; and he further said, "It was so held in the case of *The King v. Kendal*, and settled in Queen *Elizabeth's* time. The species of crime is set forth, which is enough; it need not set forth the facts, as on whom the robbery was committed, or whose house broke open—publishing a libel is a crime well known in our law." Supposing it were only for suspicion of high treason, he shall

(a) *Fortescue*, 140.——(b) *Salk.* 347. S. C. *Ld. Raymond* 65.

not be discharged, but shall answer it. In the case of *The King v. Kendal and Roe*, the party might be innocent of the crime; yet they continued him on his recognizance, but did not discharge him. I do not know that ever there was any time mentioned in any warrant, so that exception goes to all warrants: suppose the warrant had been to commit without bail or mainprize, if crime certain were charged, the party should not be discharged. In the trial of *The Seven Bishops*, however, it has been said, that as far as Mr. Justice *Powell's* opinion went, they ought to have been bailed; but it is quite clear, upon looking at that case, that the only point that came before the Court relative to the present question, was, whether they, having privilege of Parliament as Bishops, were the subjects of bail, and that rendered it quite unnecessary to discuss the other points; but I agree with what the Lord Chief Justice there said, "Why should they discuss whether, having privilege of Parliament, they were the subjects of bail, if the general law of the land was, that no man could be apprehended for libel at all, whether a peer or commoner?" It is to be observed, that it has been assumed, by a very great authority in this Court, some years ago^(a), that Mr. Justice *Powell* dissented from his Brethren on that occasion. That, however, does not appear to have been the fact; for he only said, "I will not decide until I have looked into the cases upon the subject." There the other Judges did not require time to look to authorities, therefore it was not given, as they were clearly of opinion, that the Bishops were not bailable; but though one Judge might wish to look into authorities, still, if the other three had formed their opinions, there is no reason whatever for time being given, and from a sacred seat of justice, I think it was too much to say of three Judges, that they were dishonest, and that Mr. Justice *Powell* was the only honest man of the four. *Wilkes's* case has been much pressed on

1820.

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BUTT
v.
CONANT.

(a) Lord Chief Justice Pratt.

1620.
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 BUTT  
 v.  
 CONANT.

the Court in the course of the argument; but it is an authority for the defendant, because there, as in the case of *The Seven Bishops*, the only question was, whether the privilege of Parliament was to exonerate the defendant, and it is worthy of remark, that in that case there were two other points taken, either of which were more general, and would apply equally to all the King's subjects, as well as to a member of either house of Parliament; but the Court unanimously decided, that those points would not serve the defendant;—but if they had thought those matters applied generally to the subjects of the realm, why did not they proceed upon the general point, as to whether a person could be arrested or held to bail for a libel, which would have been much more palatable to the party Mr. *Wilkes* at that time espoused in politics, than resting his case on the narrow and shallow ground that he had privilege of Parliament? I think there is a great deal of weight in the observation to which my Brother *Bosanquet* has directed the attention of the Court, as to the difference of the reports of that case; but I do not think that more credit is to be given to one than the other; for whenever a reporter chooses to mix himself up, as Mr. Serjt. *Wilson* has done, in the contest with the politics of the litigant parties, I cannot pay so much credit to him; and throughout the whole of his report of that case, it is manifest that he formed a very strong party opinion, and therefore it appears to me, if they are set up one against the other, that the report in *Howell's State Trials* is much more likely to be fair and correct. But after all, if there be any doubt upon this point (although fully agreeing that a usage for one hundred years against the known law of the land, would not make a law), can it be questioned, after the documents furnished from the House of Lords, in which it appears to have been the constant and uniform practice, from the reign of *Anne* to nearly the conclusion of the reign of his late Majesty? My Brother *Vaughan*, however, has said, that instances of, com-

mitment in cases of this nature, only go back to the reign of Queen *Anne*. The order of the House of Lords was to search back as far as the Revolution, and the officer reports that he had only searched the records from the reign of Queen *Anne*, not doubting that he should find other instances of a similar description, if he carried his researches to a prior period; and it has been further insisted, that we must suppose the law to be otherwise, because there have been but five instances during the reign of our late Sovereign. That, however, I think, tends to shew those who are not superficially observing, that the law has been administered with the greatest humanity and lenity. It has been also said, that these were not commitments by Justices of the Peace to the Sessions, and that they have never been considered so. Still they were commitments by Justices of the Peace, for the parties to answer in the Court of *King's Bench* to indictments which were afterwards preferred against them individually. A number of them were discussed upon *habeas corpus*, in the times of Lord *Holt*, the supposed great assertor of liberty, at the time of the Revolution, and before Lord Chief Baron *Parker*, Lord Chief Justice *Pratt* (afterwards Lord *Camden*), Lord *Hardwicke*, and Lord *Raymond*, assisted by all the eminent Judges of their time. It is too much to suppose that all these proceedings were irregular. I am therefore of opinion, that this action is not maintainable, and that the defendant is entitled to the judgment of the Court.

1820.  
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 BUTT
 v.
 COBANT.

Mr. Justice BURROUGH.—Agreeing with my learned Brother in opinion, that it is not necessary for me to express my sentiments on this occasion, because I think the judgment delivered by my Lord Chief Justice contains every thing that I can say; still we are called on individually to give our opinion on a matter of great importance and magnitude. In investigating this question, I find it necessary to advert to the libels as stated in the special verdict. The

1820.
 ~~~~~  
 BUTT  
 v.  
 CORANT.

Jury have found that the plaintiff had composed and published, stuck up, affixed and distributed, in divers public streets and places, within the city and liberty of *Westminster*, two libels. The one, charging the then Lord Chief Justice of the Court of *King's Bench* with having committed a robbery on the plaintiff, by passing a sentence on him to make money, and to put the King's fine into his own pocket, instead of its going into the public treasury. The plaintiff in this libel then proceeded in these words: "I do hereby placard him as a disgrace to the Bench of Judges, the society of gentlemen, and the nation at large."—I therefore think that it is highly expedient that every one should know what the charge was, upon which the present defendant proceeded.

The other libel, although aimed principally at Lord *Castlereagh*, a Privy Counsellor, also contains reflections on the late Lord Chief Justice of the *King's Bench*, and in this the plaintiff said, "I placard him" (that is, Lord *Castlereagh*) "for having stated a gross falsehood in the House of Commons, in a debate in the House, to answer his own purpose, in stating to the House that the plaintiff had petitioned Government for the mercy of the Crown, upon which the pillory sentence was taken off." He then said, "My petition was to the Prince Regent, to be liberated, being unjustly convicted by Lord *Ellenborough* to make money of me." Nothing can be more offensive or more scandalous than the whole subject-matter of the libels themselves. My Brother *Vaughan* has very properly said, in his argument for the plaintiff, that the question to be decided is one of constitutional law, as it affects the liberty of the subject, and the freedom of the press; and if I conceived that the decision of the Court would affect the liberty of the subject in any matter or manner in which it ought not to be affected, I should, with the greatest reluctance, concur in thinking that judgment should be given in favour of the de-

fendant. So, on the other hand, if I thought it would affect the freedom of the press, I should be equally unwilling to do so. But I am clearly of opinion, that the present judgment will have no such effect, but, on the contrary, will protect the liberty of the subject and the freedom of the press. Whilst the press is used with that freedom of discussion and reasoning, which in *England* is indulged undisturbed, to a great, and indeed to every useful degree, it will meet with the protection of the law, and the approbation of all individuals who are well-wishers to their country, and who know the blessings of a free constitution. But when it is used to charge the Chief Justice of the Court of *King's Bench*, the first Magistrate in our Courts of law, with corruption in his office, and a Privy Counsellor, and Member of Parliament, with abusing his character and situation in the latter capacity, by stating falsehoods in the House of Commons, to answer his own purposes, it appears to me that this is an abuse of that freedom, and that, in order to preserve it, it is necessary the abuse should be reprobated. The people of *England* have a serious interest in the character and the conduct of the Judges, and others who are appointed to serve the State in high and important offices, and they, as individuals, have a valuable interest in their respective characters. I have not lightly introduced these observations: they are, in my view of the case, extremely important, in leading to the opinion which I have formed. It is material to the case of the defendant; and the facts which appear on the special verdict; to have thus stated what was the nature of the charge on which he took the information, and committed the plaintiff to prison for want of bail. This brings me to the point to be decided, which is, whether the matter contained in the information taken by the defendant, a Justice of the Peace, was a matter within his jurisdiction? and whether he has proceeded in such a manner as to form a justification to the plaintiff's action of assault and false imprisonment? The

1820.

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 BUTT  
 v.  
 CONANT.

1820.  
 ~~~~~  
 BUTT
 v.
 CONANT.

jurisdiction of a Justice of the Peace is founded on the commission of the peace, by which some powers are expressly given, or it is founded on other powers incident to those which are so given, and on particular statutes, superadding powers and authorities in particular cases. The latter, namely, the powers given by particular statutes, have no bearing whatever on this case.

It appears to me to be necessary to state the commission of the peace for the sake of a few observations I have to make on it, with a view to the facts of the case, as stated in the *Year Book*, to have passed at *White Friars* (a). By the commission of the peace, the Justices named in it are jointly and severally assigned to keep the peace, and to keep and caused to be kept, all ordinances and statutes for the good of the peace, and for the preservation of the same, and for the quiet rule and government of our people in all and singular the articles thereof. Then follow other powers not necessary to be noticed. This first part of the commission authorises all and each of them to act out of Court. Then follows that clause in the commission, which constitutes the sessions, and gives them an authority to act there; it authorises them to enquire the truth by the oath of good men, "of all and all manner of felonies, witchcrafts, enchantments, sorceries, magic arts, trespasses, forestallings, regratings, engrossings, and extortions whatsoever, and of all and singular other misdeeds and offences, of which Justices may enquire," and also "of all those who in the aforesaid county in companies against our peace, in disturbance of our people with armed force, have gone or rode, or hereafter shall presume to go, or ride." It is very singular to observe, that the question at *White Friars*, on which all the law seems to have been got together, was to decide whether the law was broken by

(a) 2 Hen. 7. fol. 2. 5.

an illegal assembly of armed people. This clause in the commission is founded on a statute which the Judges who met on that occasion could never have seen, because it was passed in the 2d *Edw. 3.* (a) the title of which is, "No man shall come before the Justices, or go or ride armed;" and then it is enacted, "that no man, great nor small, of what condition soever he be, except the King's Servants in his presence, and the King's officers, in executing of the King's precepts, or of their office, and such as be in their company assisting the said officers, and officers also (upon a cry made for arms to keep the peace), and the same in places where such acts happen, be so hardy to come before the King's Justices, or other of the King's Ministers, doing their office with force and arms, nor bring force in affray of the peace, nor to go nor ride armed by night nor by day in fairs, markets, nor in the presence of the Justices or other Ministers, nor in any part elsewhere, upon pain to forfeit their armour to the King, and their bodies to prison, at the King's pleasure." If, therefore, those Justices had seen this statute, which makes the very matter about which they were questioning, unlawful, they could have entertained no doubt but that the peace in that case was broken. It therefore seems to me to be clear that they had not seen it; for this statute was the foundation of that latter part of the clause in the commission of the peace. It is also very material to observe, that in the enumeration of offences in the commission, treasons are not mentioned, there is no authority whatever given to Justices of Peace to enquire of treasons, yet no doubt can be entertained, but that out of Sessions they may take informations in cases of treason, and cause the accused to be apprehended and committed to gaol, to be tried at the Assizes, under the authority of their commissions, which expressly extend to treasons. It appears, then, Jus-

1820.
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 BUTT  
 v.  
 CONANT.

1820.  
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 BUTT
 v.
 CONANT.

Justices have no authority under that clause, which enables them to hold a Court to try treasons, but their authority must exist on a prior part of the commission, which directs them to keep the peace. If this be so, we are not now to look for what Justices can do at Sessions, as comprehending the whole of their authority. We have, however, in the case of libel, the strongest possible authority for saying, that it is indictable at the sessions. Treason, however, cannot be prosecuted there, yet, if the Magistrates have power to proceed on it for the purpose of commitment, it must be under the first branch of their commission, by which they are assigned jointly and separately to keep the peace, and cause to be kept all ordinances and statutes made for the good of the peace, and for conservation of the same, and for the quiet rule and government of our people. In the case of *The King v. Kendall and Roe* it is said (a), that Secretaries of State may commit as Conservators of the Peace did, at the common law, and that it was incident to their office, as it was to the officers of Justices of the Peace, who were not authorised by any express words in their commission to that purpose, but do it *ratione officii*. In the next place, it has been admitted, and indeed no one can deny it, that Justices of the Peace may commit for want of bail for an actual breach of the peace; but still it has been contended that they cannot do so in the case of a libel, which is indictable, and before the Justices too at their Sessions;—because it is not attended with an actual breach of the peace. There might be some colour for this objection, if upon enquiry it was ascertained that they could not do so in any instance where there was not an actual breach of the peace; but it is clearly otherwise, for they can do so, and always have done so in other cases in which there is no actual breach of the peace, but a direct and manifest tendency to such breach. What answer can be given to the

(a) *Salk.* 347.

case of an intended duel, of which a Magistrate either has personal knowledge or an information on oath;—may he not arrest both the parties, and for want of bail commit the challenger to prison, to be tried at the Sessions or Assizes for the offence; and may he not, if bail be given, also require the challenger to give sureties of the peace in the mean time? This practice is not only customary, but inveterate, and is founded in necessity, and yet here is no actual breach of the peace. I state, without possibility of doubt, that a Magistrate may do this; and further, that he may secure the party challenged, and require sureties of the peace of him. This too may be done, and justified under the words in the first branch of the commission. I am therefore of opinion, that the defendant was authorised in taking the information, and committing the plaintiff in the case disclosed in the present record. His duty and authority by the commission are to keep the peace, and cause all ordinances and statutes for the good and preservation thereof to be kept. They are to act so as to keep, protect, and preserve the peace, and no more effectual step can be taken for this purpose than to take information against, and to commit to prison one for want of bail, who has done an act which has a direct and manifest tendency to provoke a breach of the peace. In *Sir Baptist Hicks's case* (a) a libel is said to be indictable, because the King and Commonwealth are interested in it, as it is a provocation to a challenge and breach of the peace. A challenge is not in itself an actual breach of the peace, but to send one is indictable, as I have before suggested, and a ground for a Magistrate's interference before indictment found. Suppose it cannot be clearly ascertained that a challenge has been given, but that there is a reasonable ground to presume that a duel is intended, it cannot be controverted but that a Magistrate might act and secure the parties, and he would be

1820.
BUTT
P.
CONANT.

(a) *Hob. 415.*

1820.
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 BUTT  
 v.  
 CONANT.

highly to blame if he did not do so ; yet there is no actual breach of the peace, but is in contemplation only. As to the tendency even of slanderous words to provoke a breach of the peace, there is a well known fact in the history of the criminal law of this country, the outrage on Sir *John Coventry*, which was the reason of passing the statute of the 22d and 23d *Charles 2. c. 1.* called the *Coventry Act*. It was occasioned by mere words spoken in Parliament. How much stronger, then, is the case on this record ? A late Noble Lord then filling the high office of Chief Justice of the *King's Bench* is charged with corruption in his office, and placarded as a disgrace to the Bench of Judges, as a disgrace to the society of gentlemen, and to the nation at large ; and another noble person in high office, and a Member of the House of Commons, is charged with uttering falsehoods there, to answer his own purposes. Independently of the offence to the public at large, these libels had a direct and immediate tendency to provoke a breach of the peace, and must they not be taken to be intended to irritate and provoke the individuals libelled ? But the mischief does not stop here, it might have had the same effect on the relatives of those noblemen and their dependants. All our law books from the case *De libelli famosis* to the time of Sir *William Blackstone*, speak uniformly of this tendency of every species of libel. It is scarcely necessary to repeat them, particularly as they have been before mentioned and adverted to, but *Blackstone*, after speaking of challenges (a), says, " Of a nature very similar to challenges are libels, *libelli famosi*, which, taken in their largest and most extensive sense, signify any writings, pictures, or the like, of an immoral or illegal tendency ; but in the sense under which we are now to consider them, are malicious defamations of any person, and especially a Magistrate, made public, by either printing, writing, signs, or

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(a) Vol. iv. c. 11. s. 13. page 150.

1820.

BUTT

v.  
CONANT

pictures, in order to provoke him to wrath, or expose him to public hatred, contempt, and ridicule. The direct tendency of these libels is a breach of the public peace, by stirring up the objects of them to revenge, and perhaps to bloodshed."

It is not necessary here to maintain that a libel is an actual breach of or directly against the peace, nor to rely on the conclusion of an indictment for a libel, which has ever been alleged to be *contra pacem*. It is however certain, that in the case of *The Seven Bishops* three Judges held it to be a breach of the peace, and the other Judge (Mr. Justice Powell) did not give any opinion on that subject, although it is said in *The King v. Wilkes* (a), that he was of a different opinion; and in the report of that case, it appears that a most severe, unfounded, and unjust reflection was made on the Chief Justice, and the two other Judges who concurred with him, and the reporter might well have omitted a passage, which, if it was warranted by the fact, (which seems very doubtful,) was a libel on those Judges, whose character I have never before or since heard impeached, I therefore cannot believe it was ever said, for what authority had any person to say, that the fourth Judge was the only honest man of the four, because he differed from the rest? But it appears he did not differ from them, as he merely required time to look into the authorities, and I cannot discover any thing which reflects on their characters. All our text writers and books of authority uniformly speak of the direct and immediate tendency of libels to cause breaches of the peace; I am therefore of opinion, that in principle, the justification of the defendant in this case is well made out, and that he is entitled to judgment, because it appears to me that he was well authorised in what he did by the commission of the peace, as well as by the nature of the crime itself. It is very remarkable,

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(a) 3 Wils. 160.

1820.

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BUTT  
v.  
CONANT.

and scarcely credible, that when the case of *The King v. Wilkes* was before the Judges of this Court, they never thought of examining the Crown Office to ascertain the course of proceedings there; it is quite impossible that they could have known, that from the 3d of *Anne* down to nearly the present time, there had been a course of precedents to establish the point;—if they had known that, certainly some of the expressions supposed to have been used in that case, would not have appeared in it. But it has been observed, that the practice of commitment for libels appear to have stopped about the third year of the late King, that is very easily accounted for, and I do not think it affords any objection to the precedents in the Crown Office before and since. During the late reign, the course has been to file informations by the Attorney-General, where the libels were against government, and individuals applied to the Court for leave to file informations; and it is well known that it was the subject of clamour, that the Attorney-General was pursuing a practice not warranted by the usage of the law of the country, and that is the reason that that course has not been since pursued. But now, when we are about to return to the constitutional course, of which one would suppose those who are fond of libelling would not complain; it is said we are acting illegally; returning to the clear course of the common law, and going before the Grand Jury, is now alleged to be illegal, and the former was decried as being unconstitutional. I am, however, most happy to find, in looking through the case minutely, and carefully examining all the authorities, that the proceedings by the defendant have been legal. I am satisfied it is constitutional, and so far from affecting the freedom of the press, or the liberty of the subject, the prosecutions of this flagrant description of libels, in the way this has been prosecuted by information before a Magistrate, will be found to be a more humane course than any other, and conducive of the greatest good to

the public ; and I am of opinion the defendant was perfectly justified in acting as he has, and therefore that he is entitled to judgment.

1820.

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BUTT  
v.  
CONANT.

Mr. Justice RICHARDSON.—After the full discussion this case has received at the Bar, and the able decisions of my Lord Chief Justice, and my Brothers who have preceded me, I should wish to be spared expressing the grounds of my opinion. In a matter of this importance, however, I think it necessary, as briefly as possible, to state the reasons that have induced me to come to the conclusion I have formed, and it seems to me the shortest course for me to adopt will be, first, to consider the usage, and secondly, whether it is in any respect contrary to the principles of law, the authority of text writers, or of adjudged cases. First, with respect to the usage;—upon an investigation, by returns made to the Court of *King's Bench* alone, there have been found no less than one hundred and twenty instances between the first year of Queen *Anne* and the year 1763 or 1764 (which averages more than two cases annually) of persons bound in recognizances to appear and answer such things as should be objected against them ; these too are all instances of persons charged with libels, and the greater part of them were not bound to appear before Officers of State, but Justices of the Peace ; and it further appears, that these returns were confined to the cases of recognizances entered into for appearance alone, exclusively of which, there are several other cases of persons who appeared by writs of *habeas corpus*, and who had been committed and not found bail. These therefore are authorities to the same extent, and perhaps there is a still further and numerous class of cases where such jurisdiction has been also exercised in the case of seditious words. It is difficult to find any more satisfactory mode of ascertaining or establishing the common law, than by referring to an unvaried and undisputed usage, sanctioned by a length of time, and

1820.  
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 Burr
 v.
 Conway.

founded on legal principles, unless it is shewn that such usage is altogether contrary to the law of the land, or that it has been impugned by eminent law writers. If it be not, I do not see how any Court of Justice in *Westminster Hall*, or elsewhere, could doubt that a usage so sanctioned is founded in law. Secondly. Is this usage contrary to the authorities of the most eminent and experienced text writers? Of these, *Dalton*, the oldest, who, though not a judicial authority, was still a writer of considerable weight on points of this nature, published a book in the reign of *James the 1st*, and it is there stated (a), that "for misdemeanors done against the King's peace, (as for treason, felony, or breaking of the peace, &c.) the offenders, as well by the common law, as by divers statutes, may be arrested and imprisoned by the officers of justice, and sometimes by private persons without presentment, and these being by the law of the realm," (it is true he does not mention any other offences than treason, felony, or breaking of the peace,) "are warranted by *Magna Charta*." Although he did not mention the term "libel" there, still, on referring to another part of his work, I think it is clear what he meant, for it is stated (b), "Libellers, also may be bound to their good behaviour as disturbers of the peace;" and he assigns this as the reason, "for such libelling and defamation tendeth to the raising of quarrels and infusion of blood, and are especial means and occasions tending and inciting greatly to breaches of the peace;" this then appears to have been the opinion of *Dalton*. The next writer in point of order is *Lord Hale*, and it appears to me, that he, though treating of felony (c), does not abstain from expressing his opinion as to the jurisdiction of magistrates. It is impossible to doubt but that the passage respecting Justices of the Peace and their jurisdiction, applies generally to other offences

(a) Chap. 170. s. 4. page 582. — (b) Chap. 124. s. 2. page 412.
 (c) Book i. Chap. 50. page 575.

besides felonies, for he says (a), "I shall consider of arrests and imprisonment for capital offences;" then he mentions how offenders are generally treated when they are arrested, and proceeds to state (b), that "Justices of *oyer and terminer* may also issue their warrants in the counties within their commission, for apprehending felons or other malefactors, or for surety of the peace;"—certainly not confining himself to felonies; and then follows the passage to which I before referred: (c) *viz.* that "Justices of Peace may also issue their warrants, within the precincts of their commission, for apprehending persons charged of crimes within the cognizance of the Sessions of the Peace." If Lord *Hale* had intended to speak of felony only, he would not have used such language. He would have limited it to cases of felony only. But he here speaks of warrants being issued by Magistrates for apprehending persons charged of crimes within the cognizance of the Sessions of the Peace, "and this, though the offender be not yet indicted." His opinion therefore appears to me to be most express to the same effect as *Dalton*, who had preceded him. The next text writer in point of succession, is Mr. Serjt. *Hawkins*. I do not mean to state in detail what he says upon the subject; but, coupling Book 2. c. 13. s. 15, with c. 8. s. 38, of the same Book, I consider it to be quite clear, that his express opinion was, that Justices of the Peace had an authority to grant their warrants, not only for treason, felony, or *præmunire*, but also for other offences against the peace; and amongst those he includes libels, which he treats of, when he speaks of cases amounting only to implied breaches of the peace, for he classes libellers as persons offending against the peace, over whom the Magistrates have jurisdiction. Thus then stands the authority of the oldest and most eminent text writers upon the subject, in direct conformation of the usage;—that usage by no means appears to have originated in the reign of Queen

1830.
BUTT
&
CONANT.

(a) Book i. c. 50. page 575.—(b) *Id.* page 579.—(c) *Id.* *ibid.*

1830.
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 BUTT  
 v.  
 COMANT.

*Ans.* we should rather presume that it prevailed from time immemorial; and if a usage is found to have existed a hundred years, it is sufficient, and there is no reason to look further. But the reason that there are no older precedents on this subject is, that the House of Lords were perfectly satisfied with the returns furnished them. With respect to Lord Coke, I do not find that he gave any opinion as to the power of Magistrates on the subject of libel or misdemeanors; but an extraordinary proposition has been cited from his Fourth Institute (a), which goes a great deal too far, in which he stated, that a Justice of the Peace cannot, in cases of felony, apprehend or commit a felon before indictment. His Lordship, however, seems afterwards in the course of the same section, to admit that the law was otherwise since the statutes of 1 & 2 Phil. & Mary, c. 13, and 2 & 3 Phil. & Mary, c. 10. It is remarkable, that having those statutes then before him, he should suppose, that prior to those statutes, arrests by Justices of the Peace for felony were contrary to law. The first of those statutes was intended to restrain Magistrates, not from arresting, but from liberating offenders from arrest, in a manner more extensive than was before found convenient to the public, and that statute refers to the statute 3 Hen. 7. c. 3, which was passed for the purpose of restraining Magistrates from admitting to bail too largely, and that latter statute refers to one of a still earlier date, the 1 Richard 3. c. 3. All these statutes, as is well observed by Lord Hale (b), import, that the apprehension of persons for felony before indictment found, is lawful and right. I think it unnecessary to say any more respecting Lord Coke's opinion in that work (c), which perhaps did not receive his final approbation. It is fully considered and treated of by Lord Hale (d), and I think most satisfactorily

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(a) 177. — (b) Book ii. c. 13. page 109. — (c) *Jurisdiction of Courts*, c. 31. — (d) Book ii. page 107 to 110.

refuted.—Thirdly. Such being the usage, has it been disapproved of by Courts of Law? I shall refer shortly to five cases since the revolution. The first is that of *The Seven Bishops*, who were defended by the most eminent persons at the British Bar, and no point was there made as to the authority of a Secretary of State to hold to bail in a case of libel; and when we refer to the case of *The King v. Wilkes*, we find that Lord Chief Justice Pratt, when the objection was there pressed, relied on the silence of the defendant's counsel in the case of *The Seven Bishops*, as a reason for saying there was no weight in the objection. I will now mention the case of *The King v. Kendal and Roe*; although it was a case of a commitment by the Secretary of State, and for treason;—in both of which instances it differs altogether from the present, but I think it material, on account of the course of the argument there taken, and the opinion of the Judges. The counsel for the defendants objected, that the Secretary of State could not commit for treason, because he could not administer an oath, an objection not applicable to the case of a Justice of the Peace, and Lord Holt said (a), that “at common law, before there were any Justices of the Peace, there were commitments,” for, said his Lordship, “the Justices of gaol delivery ought to impanel a Grand Jury, to enquire of all offences committed by those in gaol, therefore, there must have been a commitment precedent;” and Mr. Justice Rokeby said, “(b) At common law, Conservators of the Peace could not execute their office without a power to commit:—and Secretaries of State are of the same nature as Conservators of the Peace were:—no statute gives power to Justices of the Peace to commit, but it is incident to their office.” This therefore falls within the general terms of their commission, which empowers them individually and collectively to keep the peace,

1820.

W  
BUTT  
v.  
CONANT.

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(a) 1 *Ld. Raym.* 65. — (b) *Id.* 66.



1820.  
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 BUTT
 v.
 CONANT.

consequently, it is vested in them as incident to their office, and gives them authority to keep the peace, and do all acts that are necessary to that great and important public object. There are two other cases, *The Queen v. Derby* (a), and *The King v. Shuckburgh* (b), which were both cases of arrest by a Secretary of State for libels. The latter has not been mentioned in the course of the argument, I will therefore shortly state what that case was :—" The defendant being taken up by a warrant from the Secretary of State for publishing '*Old England's Te Deum*,' a blasphemous libel, was brought up by *habeas corpus* in order to be bailed, and offered bail to enter into the common recognizance for his appearance from time to time, to answer such matters as should be objected against him on behalf of the Crown." The Reporter refers to this as being the common usage ;—" but Mr. *Attorney-General* insisted on bail for the defendant's good behaviour also." This, it must be observed, was before indictment found, for he was arrested under a warrant from the Secretary of State. What, said Lord Chief Justice *Lee* on that occasion? Did he suggest that the defendant could not be arrested at all? Quite the reverse, for his Lordship said, "(c) It has often been taken both ways," (that is to say, both to appear and answer, and also for good behaviour,) " but he intended to take the opinion of all the Judges," so at present the defendant himself only entered into a recognizance for his appearance, and into a rule to put in bail for his good behaviour, if the Judges, or the major part of them, should be of opinion that he ought.—" This then is certainly an authority to shew, that a person may be apprehended in a case of libel before indictment, as it was sanctioned by the Court; and it appears that the common usage was, that the defendant should offer bail to enter into

(a) *Fortescue* 140.—(b) 1 *Wils.* 29.—(c) *Id. ibid.*

a recognizance for his appearance, and answer matters objected against him, unless some distinction could be drawn between a commitment by the Secretary of State, and a commitment by a Justice of the Peace.—The argument against the Secretaries of State having such power is, that they cannot commit, because they have not the power which the Justices of the Peace have, of administering an oath, and the Court say, “that Secretaries of State have that power as Conservators of the Peace.” Therefore it follows, *à fortiori*, that Justices of the Peace must have it.—So, in the case of *The Queen v. Derby*, which was a commitment by a Secretary of State for a libel, the defendant’s counsel insisted, that a libel was not an offence for which bail could be required before indictment found, that however was by no means the opinion of the Court, but quite the contrary; for it was contended, that commitments were punishments, only after conviction, and not before;—and one objection raised for the defendant was, that the warrant to apprehend and bring him before a Magistrate excluded bail in the mean time, and therefore was unlawful. But the Court said, it is the constant course to bring an offender before a Magistrate in the first instance, and the person who brings him cannot take bail till he comes before a Magistrate, and that is in his favor, because he may excuse himself of the charge on enquiry.—My Brother *Vaughan* has observed, that it was not ventured to be argued, that a Magistrate could commit, but it was merely insisted, that this was not a commitment to prison, it was only an arrest for examination, for which bail could not be taken; but it was quite unnecessary to say, that Magistrates could commit afterwards, for there can be no doubt if they could arrest before examination, that if such examination was not favourable to the defendant, he would then be committed unless he found bail.—These are all the cases, with the exception of that of *The King v. Wilkes*, where no such point as the present was made by the defendant himself, or the Counsel who assisted him, namely, that if he had been

1820.

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BUTT
v.
CONANT.

1820.
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 BUTT  
 v.  
 CONANT.

a private individual, he would not have been amenable to the commitment. He rested his defence on three grounds, first, that he was not charged on oath; secondly, that the libel was not set out at length; and thirdly, that he was entitled to the privilege of Parliament. The Court over-ruled the two first objections, and abstained altogether from saying that a Secretary of State had more authority than a Justice of the Peace. With respect to the second point, it was impossible that Lord Chief Justice *Pratt* could entertain any doubt that a libel was a legitimate ground for holding a common person to bail; for he said that "the libel need not be set out at length,"—and why? Because he said, "as to the offence of a libel, it is such a misdemeanor as we should require good bail for, and such as the party may be able to procure." So that when the objection there taken was, that the libel ought to have been set out to enable the Court to judge of the quality of the bail to be required, his Lordship said, "We can well judge of that, without the libel being set out; for we know it is a high misdemeanor, and such a misdemeanor as would make it our duty to require good bail, having regard to the quality of the offender." Surely this is enough to shew that it was his opinion, that in a case of libel, a man may be held to bail, and bailed according to his quality; but his opinion, and that of the rest of the Court, was, that the defendant was entitled to his discharge by reason of his privilege of Parliament, and I think there must be some error in the sentence in *Wilson's* Report of that case, where his Lordship is supposed to have said, "It was absurd to require surety of the peace or bail in the case of a libeller;" he having before said, that a libel was a high misdemeanor, and that good bail ought to be taken. I entertain no doubt that the word "absurd" has crept in by mistake on the part of Mr. Serjt. *Wilson*, and more particularly so as it is not to be found in the report of that case in the State

Trial<sup>(a)</sup>, where his Lordship is made to say, "Perhaps it implies an absurdity to demand sureties of the peace from a libeller."—However, that is not the question in this case, nor was it there, for the mere taking time for an offender to answer, is quite distinct from requiring sureties of the peace: Besides, Mr. *Wilkes* was discharged on the ground of his privilege of Parliament only, although the Court there, and in all the other cases, seem to have entertained no doubt that a defendant charged with a libel might be held to bail.—Having thus gone through as shortly as I was able, the usage, the authorities of all the text writers, and the decided cases, they seem all to agree in one and the same point, namely, that the proceedings adopted by the defendant in this case are agreeable to the ancient course of the common law, and I am therefore clearly of opinion, that he is entitled to the judgment of the Court.

1820.  
BUTT  
v.  
CONANT.

Judgment for the defendant.

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(a) Vol. xi. pages 304 and 305.

1820.

Wednesday,  
Feb. 9th.

## LOPES v. DE TASTET.

Whenever a party seeks to recover for a breach of duty, arising from an employment, such employment must be stated truly in the declaration, and proved as laid, whether the action be framed in *assumpsit* or *tort*. Therefore, where a count in a declaration *ex delicto*, stated that "the plaintiff as owner of a ship had retained and employed the defendant as his agent, to cause her to proceed to *Gottenburgh*, in order that she might afterwards proceed to *St. Petersburg*, and that the defendant accepted the retainer;—and it was proved at the trial that a written arrangement had been entered into between the plaintiff's clerk or agent and the defendant, that the ship should touch at *Gottenburgh* to know the state of things in *Russia*, and receive instructions:—Held, that this was a fatal variance, as the defendant had not undertaken to proceed to *St. Petersburg* absolutely, and at all events.

**T**HIS was an action on the case. The declaration contained fourteen counts, the first twelve of which were special, imputing misconduct to the defendant as an agent, in not having forwarded a ship and cargo with despatch from *London* to *Gottenburgh*, and the two last were founded in trover. All the special counts but the tenth were inapplicable to the plaintiff's case, being founded on an illegal consideration, he being a *Portuguese*, and therefore unable to employ the defendant, a merchant in *London*, as an agent to export property of this country into *Russia* during a war with that kingdom, under the circumstances detailed in the declaration. The tenth count was in substance as follows:—That whereas, before, and at the time of the committing the grievance by the defendant thereafter mentioned, and from thence until the commencement of this suit, the plaintiff was the owner and proprietor of a certain ship or vessel, with certain goods on board thereof, lying at or near *Falmouth*; the vessel and goods being of the value of £100,000. And whereas, on the 11th of *September*, 1812, the plaintiff, at the request of the defendant, had retained and employed him as his agent in that behalf, to cause and procure the ship, with the goods therein, to proceed with all reasonable and proper despatch in that behalf, to certain parts beyond the seas, to wit, to *Gottenburgh*, in order that the same might afterwards proceed to *St. Petersburg*, whereof the defendant had notice, and then and there accepted the said retainer and employment:—It thereupon became, and was the duty of the defendant, by reason of the premises, to cause and procure the

vessel and goods therein to proceed with all reasonable and proper despatch to *Gottenburgh*. The plaintiff then assigned for breach, that through the improper conduct of the defendant in that behalf, the ship and goods did not proceed with such reasonable and proper despatch to *Gottenburgh*, but on the contrary thereof, in consequence of the improper conduct of the defendant in that behalf, remained and continued a long and unreasonable time in this country, and the voyage was never effected; and that the defendant afterwards converted and disposed of the vessel and goods to his own use, whereby the plaintiff lost and was deprived of divers great gains, which he might otherwise have acquired from the goods and the sale thereof at *St. Petersburg*; and also lost all the benefit and advantage he might otherwise have derived from importing the goods into the port of *St. Petersburg*, by virtue of a certain licence or permission from the government of *Russia*, whereby he had become legally entitled to import the same. Plea, Not Guilty.

1820.  
LOPER  
v.  
DE TARTET.

At the trial of the cause before Lord Chief Justice Dallas, at *Guildhall*, at the Sittings after the last *Trinity* Term, the evidence adduced by the plaintiff in support of this count, was a conversation that had passed between the defendant and the plaintiff's clerk, who was duly authorised to act on his behalf, and the testimony of the *Russian* Consul. The Clerk stated, that he asked the defendant why the ship had not been despatched to *St. Petersburg*, according to the plaintiff's orders, to which he answered, that he could not effect the insurance, fearing a seizure in port, to which the Clerk replied, that an *Ukase*, which the plaintiff had previously obtained, would admit the ship in question, as well as another, belonging to the plaintiff. The defendant then objected to let the ship sail, until a balance of account due to him from the plaintiff had been settled. The following document, however, by way of final arrangement, was, on the result of this conversation, drawn up by the plaintiff's clerk, and given to the defendant, who made several

1820.

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LOPES

v.

DE TASTET.

alterations and interlineations therein, which are printed in italics.

Messrs. Firmin de Tastet & Co.

GENTLEMEN,

London, 22d September, 1812.

In consequence of Mr. LOPES writing to you, that he wished you to arrange with me the affairs of his ship MERCURIO FELIX, so that she might proceed on her voyage to ST. PETERSBURGH, and after the various interviews I have had with you on the subject, I am of opinion, that for the interest of Mr. LOPES, under the present circumstances, *since you are so good as to consent to all the necessary advances.* First, the ship and cargo should be valued at £15,000 sterling, and insured in that sum, viz. £11,000 cargo, £4,000 ship. Secondly, *that the ship should touch at GOTTENBURGH to know the state of things in Russia, and receive instructions, and a clause be inserted in the policy accordingly.* Lastly, that if you think proper it would not be amiss to insure in the first instance, the ship and cargo from only FALMOUTH to SHEERNESS, as in the interval we may receive news, whether or not it would be *safe that she should proceed to Russia.* The above is what remains for me to give my opinion upon, as acting under Mr. LOPES's authority, *and if you approve it, I request you will act accordingly; it being already settled that the Captain shall give you a bottomry bond for the money, which he has already received, and that for the sums which you some time ago advanced on this same ship, and those which you have to make, to enable her to proceed on her voyage; the same Captain is to sign bills of lading of the cargo to your order, and that he shall consign his ship to your correspondents at St. Petersburg, or any other place she may land her cargo at, the whole being under your controul, and at your entire disposal for reimbursement, or until you are actually reimbursed.*—This written arrangement was given in evidence, and stamped with an agree-

ment stamp. The plaintiff's clerk then swore that the defendant some time afterwards told him that he had insured the ship and cargo from *Falmouth* to *Sheerness* for £15,000, and that she was there to join convoy to proceed to *St. Petersburg*, and that he would insure her from *Sheerness* to *Gottenburgh*, and from thence to *St. Petersburg*.—The ship proceeded to *Sheerness*, but instead of prosecuting her voyage to *Gottenburgh*, the defendant ordered her to be sent to *London*, on the ground that she wanted to be refitted, and he afterwards employed her in his own service, alleging that he had a right so to do, till the balance due to him from the plaintiff was paid. The *Russian* Consul swore that the defendant stated to him that he did not send the ship to *St. Petersburg*, as he feared she would be seized in port. His Lordship was of opinion that this evidence did not support the tenth count, and the Jury accordingly found a verdict for the plaintiff on those in trover, damages £15,000, being the value of the ship and cargo;—thereby negating the special damage alleged in the other counts of the declaration.

1826.

LOPES
v.

DE TASTET.

Mr. Serjt. *Lens*, in the course of the last Term, applied for a rule *nisi* that the plaintiff might be at liberty to enter a verdict for £34,780 on the first, second, and sixth counts of the declaration, or for £28,324, on the tenth count, instead of £15,000, found on those in trover, on the ground that the defendant ought to have forwarded the ship to *Gottenburgh*, according to the arrangements entered into between him and the plaintiff's clerk. The Court however granted the latter part of the rule only, as to whether the tenth count was supported by the evidence adduced at the trial.

Mr. Serjt. *Vaughan* now shewed cause, and insisted that the tenth count was not supported by the evidence. That at all events, the plaintiff having elected to take a verdict on those in trover, the Court had no jurisdiction to enlarge the damages found by the Jury on those counts. That the count

1820.

LOPES

v.

DE TASTET.

in question was bad in substance, as although it was framed in *tort*, it was founded on contract; and that it was therefore necessary that the contract as well as the consideration on which it was founded should be truly and accurately stated, for, in *Weall v. King*, Lord *Ellenborough*, in delivering the judgment of the Court, said (a) that "it was a rule of law, that the proof of a contract must correspond with the description of it in all material respects, and that in whatever action (be the same debt, *assumpsit*, or *tort*), the allegation of a contract becomes necessary to be made, such allegation requires proof strictly corresponding therewith, and is in its nature entire, and indivisible, and must be proved as laid in all material respects." Here, it appears, that it had been previously settled, that the Captain should give the defendant a bottomry bond, and sign bills of lading to his order, and that the ship and cargo should be under the controul of the defendant until he was actually reimbursed; in consideration of which he undertook to expedite the voyage to *Gottenburgh*. This therefore should have been stated in the count, as the material parts of the consideration on which the contract was founded. Besides, by the terms of the arrangement between the defendant and the plaintiff's clerk, the former, if he thought proper, was only to insure, in the first instance, from *Falmouth* to *Sheerness*, as in the interval it might be ascertained whether it would be safe that the vessel should proceed to *St. Petersburg* or not. This clearly formed a part of the consideration, as well as the Captain's giving a bottomry bond, and signing bills of lading, the whole of which should have been stated in the declaration;—for in *Clarke v. Grdy* (b) Lord *Ellenborough* said, that "in the case of an agreement not under seal, the consideration must be stated, and no part of the entire consideration for any promise contained in an agreement can be omitted." If the written arrangement, entered into between

(a) 12 *East*, 454. — (b) 6 *East*, 568.

the parties be not binding, the action cannot be maintained, for it can only be founded on the obligation arising from that contract; the terms of which were altered and interlined by the defendant, as a proof of his assent to it after it was drawn up by the plaintiff's clerk. The case of *Powell v. Layton* (a) seems in terms to have overturned that of *Govett v. Radnidge* (b), and though in the former, the declaration was framed in *tort*, still Lord Chief Justice *Mansfield* said (c), that it "appeared to him that the action was founded on a breach of contract, and that it was not distinguishable from any other action founded on contract;" and he also observed (d), that "the form of the action cannot alter the nature of the transaction." Lord *Ellenborough*, in *Tempest v. Rawling* (e) laid down the rule that it was not necessary to state the whole of an agreement, if the part omitted did not qualify that which was stated. Here, the count stated an engagement by the defendant to despatch the ship to *Gottenburgh*, in order that she might proceed to *St. Petersburg* at all events; and it appeared by the document given in evidence, that she was merely to touch at *Gottenburgh*, to know the state of things in *Russia*, and receive instructions. Whether she was ultimately to proceed there, remained in contingency, and qualified that which was stated in the count, which although it might be good on the face of it, still the allegation of the defendant's undertaking to proceed to *St. Petersburg* was proved by no evidence whatever. The learned Serjeant was proceeding in his argument to shew, that the count was bad in substance, when

1820.
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 LOPES  
 v.  
 DE TASTET.

The Court, being of opinion that the evidence was insufficient to maintain the allegations contained in it, called on

Mr. Serjt. *Lens* (with whom was Mr. Serjt. *Hullock*) to support the rule on that point only.—They observed, that

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(a) 2 *New Rep.* 365.—(b) 3 *East*, 62.—(c) 2 *New Rep.* 373.—  
 (d) *Id.* 370.—(e) 13 *East*, 20.

1820.

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LOPES

v.

DE TASTET.

although a wide distinction must be drawn between cases founded in contract or *tort*, still, that as here the defendant had not done his duty, but had misconducted himself in his employment, in using the ship for his own purposes, instead of forwarding her to *Gottenburgh*, the consideration need not be stated in the count, which was good in point of form and structure, and even if it were not, the evidence adduced at the trial was in fact sufficient to support it. The principles of pleading applicable to cases where the whole of the contract must be set out in the declaration, are referrible only to actions *ex contractu*, and not to those *ex delicto*. Here, it has been objected, that the count is bad, as neither the whole of the contract nor the consideration on which it was founded, nor the relative situation of the parties, as principal and agent, have been set out, and the cases of *Clarke v. Gray* (a), and *Weall v. King* (b), have been referred to. The former was an action of *assumpsit*, and was decided on the particular nature of the contract; and the latter depended on the particular structure of the count; and it was there held, that as it alleged a deceit by means of a warranty made by two defendants upon a joint sale, it could not be supported by proof of a contract of sale and warranty by one only. The decision in that case was reconcileable with *Brisow v. Wright* (c), where Lord *Mansfield* said (d), that "the object of the rules of pleading are precision and brevity, and a plaintiff need only state the substance and legal effect of that part of a deed on which his action is founded; but if it be alleged, it is necessary to prove it." In *Weall v. King*, Lord *Ellenborough* said (e), that "the argument on the part of the defendant had been, that it was an action founded on *tort*; that *torts* were in their nature *several*, and that in actions of

(a) 6 *East*, 564. — (b) 13 *East*, 432. — (c) 2 *Doug.* 665. —
 (d) *Id.* 667. — (e) 12 *East*, 454.

tort one defendant might be acquitted, and others found guilty." That, his Lordship admitted, but said, "it was not sufficient to decide that question, as the declaration alleged the deceit to have been effected by means of a warranty made by both the defendants, in the course of a joint sale by them both of sheep, their joint property; that the joint contract thus described was the foundation of the joint warranty laid in the declaration, and essential to its legal existence and validity." The decision in that case, therefore, did not turn on the necessity of alleging the consideration, but simply on the question whether the sale and warranty was a contract by one or two individuals. In *Tempest v. Rawling* (a), the declaration was framed on an agreement between a landlord and tenant, and it was held, that it was not necessary to set out the whole of the agreement, but only that part of it which related to the breach committed by the defendant; and there the contract alone was the consideration of the defendant's promise, and the action was *assumpsit*. If the plaintiff had so declared in this case, and intended to rely on the arrangement entered into between his clerk and the defendant, on the 22d of September, to sustain the count, it is true he should have set out the whole of it, and averred performance on his part as a condition precedent; but that principle does not apply to an action *ex delicto*, which, although founded on a contract, still as it turns on misfeasance, the mere nature of the defendant's employment is matter of inducement only, and therefore, in point of strictness, need neither to be alleged nor proved. It was therefore sufficient for the plaintiff to shew, that the defendant had accepted his employment, and had been guilty of misconduct in the exercise of it; and as the count is good in structure, the evidence given is sufficient to support it. The cases of *Coggs v. Bernard* (b), *Powell v. Layton* (c), and

1820.

LOPES

v.

DE TASTET.

(a) 13 East, 18. — (b) 1 Salk. 26. S. C. 3 Salk. 11, — (c) 2 New Rep. 365.

1820.

 LOPEZ
 v.
 DE TASTET.

Govett v. Radnidge (a) shew, that where a count is substantially good in form, the whole of the consideration need not be set out. The case of *Max v. Roberts* (b) decided, that if a plaintiff fail in proving all the defendants to be owners of a ship in which his goods were to have been carried on freight, he could not recover even against those whom he proved to be owners, in an action on the case, alleging a deviation. But there it was not stated that the defendants were employed by the plaintiff for the purpose of carrying the goods on freight; here, however, it was averred that the defendant accepted the retainer. But the count in question is not to be sustained by the terms of the written instrument only, for the parol evidence of the plaintiff's agent alone was sufficient to warrant the Jury in finding a verdict on this count, as the written arrangement was mere evidence of an agreement, and not an agreement in itself. It was signed by neither of the parties, and was a mere *project* of the plaintiff's clerk, to which the defendant assented, as to the nature of his employment, namely, to forward the ship to parts beyond the seas; and it was immaterial to allege, whether she were to proceed to *Gottenburgh* or *St. Petersburg*, absolutely or contingently. At all events, as the allegation of her proceeding to *Gottenburgh* was laid under a *videlicet* in the count in question, it may be considered as mere surplusage, which, although stated, the plaintiff was not bound to prove, for it would have been quite sufficient for him to allege that the defendant undertook to despatch the ship to certain parts beyond the seas. Besides, it appears from the whole tenor of the evidence, that it was the intention of all the parties that the ship should, if possible, proceed to *St. Petersburg*, and a duty was imposed on the defendant so to do, he being an agent employed by the plaintiff, as in the cases of *Coggs v. Bernard*, and *Max v. Roberts*; and the *dictum* of Lord Holt in the former case

(a) 3 East, 62.—(b) 2 New Rep. 454.

is applicable to the present, for he said, (a) "that the defendant having actually entered upon the thing, according to his promise, and having miscarried, was liable to an action; for it was a deceit upon the plaintiff, who trusted him, and that was the cause of action; for though he was not bound to enter upon the trust, yet, if he did enter upon it, he must take care not to miscarry, at least by mismanagement of his own." So, here, the defendant having taken the ship from *Falmouth* round to *Sheerness*, it became his duty to proceed to *Gottenburgh* with all possible expedition:—but after having acceded to the terms proposed by the plaintiff's clerk, and after having undertaken at all events to send the ship to *Gottenburgh*, he not only neglected so to do, but converted her to his own use; and although the ultimate place of her destination might be *St. Petersburg*, or not, still there was sufficient evidence for the Jury to find a verdict on this count for the special damage the plaintiff had sustained, owing not only to the defendant's not having forwarded the ship, but also in his not having permitted her to leave this country. If, therefore, the Jury had found a verdict on this count, it could not have been disturbed, as being against evidence; and it is consequently sufficient to say, that both the oral and written evidence adduced at the trial, in point of fact, fully substantiated the allegations contained in this count, and more particularly so, as no evidence whatever was adduced, to shew that the original contract had been put an end to.

Lord Chief Justice DALLAS.—I am of opinion, that in this case, the count in question is not supported by the proof adduced at the trial. The application now made, is merely for permission to enter a verdict on this count, if the evidence can warrant such entry. In this state of the case, the consideration for the defendant's undertaking is entirely out of the question, for the only point is, whether the Court

1820.

LOPES

v.

DE TASTET.

(a) 1 Salk. 26.

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1828.
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LOPES
v.
DE TASTET.

can alter the verdict found by the Jury, which has negatived the special damage alleged by the plaintiff to have accrued to him from the misconduct of the defendant in this particular count. If, therefore, we should be of opinion that the count, as framed, was not supported by the evidence, the question as to the consideration will not arise. I shall therefore confine myself to the nature of the proof given at the trial, to support the allegations contained in the tenth count of the declaration. It is therein alleged, that the plaintiff had retained and employed the defendant as his agent, and that he accepted such retainer and employment. It then averred, that a duty arose out of such employment, and assigned a breach of such duty, as the ground of the plaintiff's complaint. Without going into the distinction between cases founded in contract, where the entire consideration must be alleged, and those where declarations are framed in *tort*, I may go thus far, that wherever a party seeks to recover for a breach of duty arising out of an employment, such employment must be stated truly, and whether it be more or less extensively stated, it must be proved as alleged. This, therefore, reduces the question in this case to one simple point, *viz.* Whether the employment of the defendant by the plaintiff, as stated in the count in question, was proved or not? That will depend on the allegation in that count, which was, that he had retained and employed the defendant as his agent, to cause and procure his ship, with a cargo of goods therein, to proceed with all reasonable and proper despatch, in that behalf, to certain parts beyond the seas, to wit, "to *Gottenburgh*," and it was further alleged, as *part* of the *entire* duty of the defendant, "in order that the same might afterwards proceed to *St. Petersburg*." It is therefore declared upon, as an entire undertaking by the defendant, that the ship should proceed to *Gottenburgh*, for the purpose of going absolutely to *St. Petersburg*. There is consequently not only a material distinction between an absolute or conditional ulterior destination to *St. Petersburg*, but an essential difference in

the reason of the thing, because a conditional undertaking to proceed to *St. Petersburg* is, in its very nature wholly different from an express or absolute undertaking to proceed there at all events. According to the written arrangement or agreement between the parties, the defendant merely undertook that the ship should touch at *Gottenburgh*, to learn the state of things in *Russia*, and receive instructions; or in other terms, to ascertain at *Gottenburgh* whether she might safely proceed to *St. Petersburg*, or not. That is wholly different from the express undertaking of the defendant, as stated in the tenth count of the declaration, that the ship should proceed to *St. Petersburg* at all events, after her arrival at *Gottenburgh*. This appears to me to be not only a material but fatal variance, between the facts as proved at the trial, and the allegations contained in the tenth count of the plaintiff's declaration, and I therefore think, that the verdict found for him cannot be enlarged by entering it on that count.

1820.
LOPES
v.
DE TASTE.

Mr. Justice PARK.—I am entirely of the same opinion. The only point now to be considered, arises on the tenth count of the declaration. It has been ingeniously argued for the plaintiff, that it was good in point of form and structure. Of that there can be no doubt. Cases, however, have been adverted to, for the purpose of shewing that it might be supported by the evidence given at the trial; but from all the decisions in that class of cases, from *Powell v. Layton* (a), to that of *Green v. Greenbank*, (b); which supported the case of *Weall v. King*, (c) the rule appears to be, that whether the action be in point of form *ex delicto*, or *ex contractu*, yet, that if the cause of such action be a breach of duty arising from an employment, it must be truly stated; and therefore the only question here is, whether the evidence given at the trial is consistent with the nature of the duty and employment of the defendant, as stated in the count in question? Although

(a) 2 New Rep. 365.——(b) 2 Marsh. 485.——(c) 12 East, 452.

1820.
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 LOPES  
 v.  
 DE TASTET.

some difficulties may present themselves, as to the acts of the parties, and although it may be unnecessary to fix the precise time when the arrangements were ultimately entered into between them, still the object of the voyage in question is only to be ascertained from the written document of the 22d of *September*, which has been mainly, if not solely relied on, to prove the allegations contained in the tenth count of the plaintiff's declaration. I think it is impossible to say, that a conditional undertaking to proceed on a voyage to a certain place, and that too under contingencies, can support a statement of an absolute undertaking to proceed there at all events. The arrangements as to the voyage in question, were made by the plaintiff's clerk and the defendant, and although it might have been the wish of the plaintiff that the vessel might proceed on her voyage to *St. Petersburg*, still it was merely stipulated, that she should touch at *Gottenburgh*, to know the state of things in *Russia*, and receive instructions. For what purpose? To ascertain whether it would be wise or prudent, under the then existing circumstances, to proceed to *St. Petersburg*, or not. This, therefore, cannot support an express allegation of employment and retainer of the defendant by the plaintiff, in the course of which, the former undertook to cause and procure the ship, and goods on board thereof, to proceed to *Gottenburgh*, in order that the same might afterwards proceed to *St. Petersburg*—and that too, at all events. She was only to proceed there, in case she should receive instructions at *Gottenburgh* that it would be safe to do so. I therefore am of opinion, that the count in question is not supported by the evidence adduced at the trial; and consequently that the plaintiff cannot be placed in a better situation than he now is by the verdict found for him by the Jury.

Mr. Justice BURROUGH.—Whether this action be, in point of form, *tort* or *assumpsit*, the nature of the defendant's retainer and employment must be truly and accurately stated in the declaration, and strictly proved as laid; the

only question therefore is, whether this has been done in the present instance? It appears by the arrangements entered into between the plaintiff's clerk and the defendant, on the 22d of *September*, that it was doubtful whether it would be safe or prudent for the vessel to proceed to *St. Petersburg*, and it was therefore determined, that that doubt should be cleared up when she had arrived at *Gottenburgh*. It was therefore properly alleged, that she was to proceed to *Gottenburgh*; but her ultimate course was not to be decided on, until after she had arrived there, and it was then to be ascertained, whether it might be discreet for her to proceed further, or not. But it is expressly alleged in the count in question, that she was to proceed to *Gottenburgh*, in order to proceed afterwards to *St. Petersburg*. That is not true, as whether she were to proceed there or not, was to depend on circumstances which could not be ascertained until after her arrival at the former place. The result of the voyage, therefore, depended on circumstances which might accrue after the ship had left this country, and which could only be ascertained at *Gottenburgh*. This, therefore, was not an absolute undertaking by the defendant to proceed to *St. Petersburg* at all events, but rested wholly on contingency, as to what instructions the master or commander might receive, on his arrival at *Gottenburgh*, as to the then state of things in *Russia*, and whether it might be prudent to proceed to *St. Petersburg*, or not. I am therefore clearly of opinion, that the allegation in the count in question was not supported by the evidence adduced at the trial.

1820.  
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 LOPES
 v.
 DE TASTET.

My Brother *Richardson* (a) has requested me to state, that he was engaged in the cause, and therefore abstains from giving any opinion.

Rule discharged, and the former verdict to stand.

1820.

Thursday,
Feb. 10th.

SELBY v. CRUTCHLEY.

A defendant
in replevin re-
siding abroad,
must give se-
curity for
costs.

THIS was an action of replevin, founded on a distress for rent.

Mr. Serjt. *Lens*, on a former day in this Term, had obtained a rule *nisi* that the defendant should be restrained from proceeding further in the action, until he had given the plaintiff security for costs, in case he should obtain a verdict, on the ground that the defendant was resident abroad, and had refused to give such security on application being made to him for that purpose.

Mr. Serjt. *Pell* now shewed cause. This is an application *prima impressionis*. Although the Court may compel a foreigner, or a person resident abroad, to give security for costs, still they cannot oblige a defendant in replevin to do so; for, although in many instances he might be considered as a plaintiff, yet, in this case, he was a laudlord, and must therefore be left to the usual remedy which the law affords him for the recovery of his rent.

Mr. Serjt. *Lens*, in support of the rule. Although no instance has occurred where an application of this description has been made, still it is analogous to those cases in which it has been decided, that foreigners or natives of this country, resident abroad, and out of the jurisdiction of the Court, must give security for costs. Here, the defendant originally brought the cause into Court, and compelled the plaintiff to go on, so that in point of fact, the defendant commenced the proceedings by distraining. He is therefore to be considered as standing in the situation of an ordinary plaintiff, and, being resident without the jurisdiction of the Court, must give security for costs as in other cases.

Lord Chief Justice DALLAS.—On reason and principle, I think that no distinction can be drawn between a defendant in replevin, and a plaintiff who may be required to give security for costs, on the ground of his residing abroad, or without the jurisdiction of the Court. The rule, as to giving such security, was at first limited to foreigners only, because they could not sue in Courts of Justice in this country; but it was afterwards extended to natives of this kingdom, resident abroad, because it was just and reasonable. So here, I think it is equally just, that as a defendant in replevin, residing abroad, cannot be distinguished from the plaintiff in that situation in an ordinary case, he must give security on application being made to him for that purpose.

1820.
SELBY
v.
CRUTCHLEY.

Per Curiam.

Rule absolute.

STEWART v. LOMBE, Esq. ROBERT WRIGHT, and
JOHN WRIGHT.

Thursday,
Feb. 10th.

THIS was an action on the case, brought against the defendant *Lombe*, as sheriff of the county of *Norfolk*, for pulling down and taking away a windmill, as a chattel, under a writ of *feri facias*, issued at the suit of the defendant *Robert Wright* against one *Burgess*; and against the defendant *John Wright*, as the purchaser of the mill from the sheriff. The first count of the declaration stated, that *Burgess*, before the committing the grievance, was possessed of a close of

A. being seised in fee of a close, on which a windmill was erected, mortgaged the close to *B.* for 1000 years, and in the same deed there was a conveyance by bargain and sale of the mill to him in fee. The mill

was built of wood, removeable at pleasure, and fixed to brick work, which was let into the ground: Held, that the mill could not be taken in execution under *feri facias* sued out against *A.* by one of his creditors, although *A.* had continued in possession, and carried on his trade therein.

1829.

STEWART
v.
LORD.

land, and a windmill erected thereon, as tenant to the plaintiff, the reversion thereof remaining in him, and assigned for breach, that the defendants, intending to injure the plaintiff in his reversionary estate and interest in the close and mill, while *Burgess* was tenant thereof to him, pulled down the mill, and carried away the materials thereof, and converted the same to their own use, to the damage of the plaintiff's reversionary estate. The second count stated, that *Burgess* was a tenant at sufferance to the plaintiff. The third count stated, that *Burgess* was seised in fee of certain closes, situate, &c. upon one of which a windmill had been erected; and being so seised of the closes, and the mill being in his actual possession, by an indenture, made on the 6th March, 1818, between himself of the one part, and the plaintiff of the other; *Burgess*, in consideration of £1095, to him paid by the plaintiff, conveyed the closes to him, to hold the same to the plaintiff for 1000 years, subject to a proviso, that the term should determine on payment of £1095, and interest, by *Burgess*, to the plaintiff, on the 6th of June, 1818, (being three months after the date of the deed) by virtue of which indenture the plaintiff became entitled to the closes, and mill so erected on one of them, for the term aforesaid. The plaintiff then averred, that the said sum of £1095 had not been paid on the 6th of June, 1818, or at any time since, and that the closes and mill, from the time of making the indenture, until the committing the grievance, remained in the occupation of *Burgess*, the plaintiff being, during all that time, entitled to the same;—and assigned for breach, that the defendants, intending to injure the plaintiff's estate and interest in the closes and mill, and to deteriorate and render ineffectual his security for the repayment of the said sum of £1095, with interest, whilst they were in the occupation of *Burgess*; and whilst the plaintiff was so interested therein, pulled down and destroyed the mill, and took away and converted the materials thereof to their own use. The fourth, was a count in trover, for taking away

bricks, timber, and other materials belonging to the mill.—
Plea, not guilty.

1820.

STEWART
P.
LONG.

At the trial of the cause before Lord Chief Justice *Dallas*, at the last assizes for *Norfolk*, the facts appeared to be these : — *Burgess* had purchased the close in question of the plaintiff, and had afterwards mortgaged it to him, having previously bought the mill, which he erected thereon, and which was constructed in the usual manner in which windmills are constructed for the purposes of trade, and placed on a circular wall of brick-work, to which it was fastened, but was removable at pleasure ; and he there carried on trade as a miller and baker. By the mortgage deed, *Burgess* conveyed the close in question ; (on which it was stated he had lately erected and placed a windmill,) to the plaintiff for 1000 years, and bargained, sold, assigned, and set over the mill so erected, together with all the sails, geers, &c. to the plaintiff in fee. *Burgess* also covenanted that he was owner of the close and mill, and that he had full power to grant, and that on default of payment of interest, the plaintiff might enter and sell. The whole of the mill was taken by virtue of a *fiery facias*, issued against *Burgess* by the defendant *Robert Wright*, the brick-work only on which it had stood being left. For the defendants, it was contended, first, that the mill might be taken in execution, as it was a chattel, and a mere structure erected expressly for the purposes of trade, and so constructed as to be taken down and put up again with facility ; and, secondly, that when it was taken in execution, it was in the actual possession of *Burgess*, the mortgagor, and not in the plaintiff as mortgagee ; and that he, being out of possession, the mortgage was fraudulent and void. The Jury found that the mill was not a fixture, but under his Lordship's direction, they gave a verdict for the plaintiff damages £270, and leave was given the defendants to move to set it aside, and to enter a non suit, if the Court should be of opinion that the plaintiff was not entitled to recover.

1820.

STEWART
v.
LOMBE.

Mr. Serjt. *Blosset*, in the last Term, having accordingly obtained a rule *nisi* that this verdict might be set aside, and a nonsuit entered; and cited *Poole's* case, (a) and *Elwes v. Maw* (b), to shew that the mill might be removed as between landlord and tenant, and *Edwards v. Harben* (c), and *Reed v. Blades* (d), to shew that it was not the property of the plaintiff as mortgagee, *Burgess* being in the actual occupation of it :

Mr. Serjt. *Frere* now shewed cause, and insisted that the plaintiff was clearly entitled to retain his verdict, as the removal of the mill was an injury to the realty, it having passed to him by the mortgage deed. If not, it would be vested in him as a chattel affixed to the freehold. The assignment by way of mortgage, from *Burgess* to the plaintiff, was founded on a good and legal consideration, and there is not even the slightest ground to presume fraud. In *Kidd v. Rawlinson* (e), where the goods of *A.* were taken in execution and put up to sale, and *B.* became the purchaser, and took a bill of sale of the sheriff, but permitted *A.* to continue in possession, who then executed another bill of sale to *C.* a creditor; under which the latter took possession; whereupon *B.* brought an action against *C.* for the goods:—It was held, that the first bill of sale was valid, and that *B.* was entitled to recover. If, therefore, there be a good and valid consideration, the property of a chattel may pass without actual possession. The mill in question fell within the description of articles affixed to the freehold, as in the case of *Horn v. Baker* (f), where the question was, what utensils passed to assignees of a bankrupt, and the line was there drawn between those which were affixed to the freehold, and those which were not.—Here, however, the possession by *Burgess* was not inconsistent with the deed, as the mortgage was *bonâ fide* made in the first instance, and the mill passed to the plaintiff as part of the realty, with the conveyance of the land. Even if it had not

(a) 1 *Salk.* 360. — (b) 3 *East*, 38. — (c) 2 *Term Rep.* 587. —
(d) 5 *Taunt.* 212. — (e) 2 *Bos. & Pul.* 59. — (f) 9 *East*, 215.

been named, it would have passed to the plaintiff as mortgagor. If the deed be construed according to the intention of the parties, there can be no doubt but that the mill was to pass as well as the close on which it stood. With respect to the nature of the building, it must be considered as part of the freehold, as it must be firmly fixed in the earth, for the purpose of withstanding wind and tempest.

1820.
STEWART
v.
LOMBE.

Although questions have been often raised as to whether articles be fixtures or not, still they have arisen as between landlord and tenant, or heir and executor, but not between a mortgagor and mortgagee, or grantor and grantee, or persons claiming against their own deed. Whether, however, the mill was parcel of the realty or not, the plaintiff is not precluded from recovering by the finding of the Jury—for, in point of fact, it was a fixture, and might have been so considered, even as between an heir at law and an executor. As to its being used for the purposes of trade, it bears no analogy to the cases which have been determined on that point, as this is not a question between landlord and tenant. In *Elwes v. Maw* (a), Lord *Ellenborough* said, that “no adjudged case had gone the length of establishing that buildings subservient to purposes of agriculture, had been removable as between landlord and tenant, even although the tenant himself built them during his term.” [Lord Chief Justice *Dallas*, Lord *Ellenborough* there distinguished between annexations to the freehold for the purposes of trade, and those made for the purposes of agriculture.] As to the sheriff’s right to remove the mill, *Poole’s* case (b) may be relied on, but it is inapplicable, because *Burgess* himself could not have removed it after he had mortgaged it to the plaintiff, and therefore the sheriff could not take it at the suit of one of *Burgess’s* creditors. As, therefore, the mill may be considered as part of the realty, no possession was necessary:—it passed by the deed; and the case of *Edwards v. Hurben* (c), merely

(a) 3 *East*, 53.——(b) 1 *Salk.* 368.——(c) 2 *Term Rep.* 587.]

1699:
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 STEWARD  
 v.  
 LOWRE.

determined that possession must accompany the deed in the transfer of chattels, which are in the usual occupation of their owner. Even if the mill be a chattel, it must be considered as a fixture, and as not being liable to removal. Although in *Davis v. Jones* (a), where certain parts of a machine had been put up by the tenant during his term, and were capable of being removed, without injuring either the other parts of the machine, or the building, and had been usually valued between the outgoing and incoming tenant; it was held, that they belonged to the outgoing tenant:—still, that case was decided as between landlord and tenant, and turned on the construction of covenants in a lease, for the latter to leave buildings, which should be erected on the premises, to the lessor at the end of the term.

Mr. Serjt. *Blosset*, in support of the rule, submitted, first, that it did not appear that the plaintiff had ever taken actual possession of the land, much less the mill; and, secondly, that a constructive possession could not be considered equivalent to an actual possession by virtue of the conveyance by way of mortgage, from *Burgess* to the plaintiff. If the mill could be considered as parcel of the realty, it would clearly have passed with the land by the deed, but it was not mortgaged as the land was, on which it stood, neither does it form part of the realty, but is a mere personal chattel, standing on the land. The Jury have found not only that the mill was used for the purposes of trade; but that it was not a fixture, as it might be removed at pleasure, according to the custom of the country:—And it has been invariably held, that all buildings, &c. erected for the purposes of trade, may be removed. Besides, the Jury having found that it was no fixture, the verdict given for the plaintiff is wholly repugnant to such finding; and the only count on which he can be entitled to retain it, is on that of trover. In *Poole's* case (b), it was decided, that vats, coppers, and partitions, put up by

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(a) 2 Barn. & Ald. 165.—— (b) 1 Salk. 368.

a soap boiler for the convenience of his trade, might as well be taken in execution by a sheriff, as they might be removed by the tenant himself; although by such removal the house was left stript and ruinous:—and in that case the vats, &c. were not taken as part of the house, but were disannexed from it by the sheriff, and he was held to be justified in so doing. So, here, the defendants were equally justified in seizing and selling the mill. It is quite clear it was erected for the purpose of allowing *Burgess* to carry on his trade; and was merely fixed to the land to prevent its being injured, and to protect it during the time it was working. *Burgess* and the plaintiff have both treated the mill as a chattel; for by the deed, the land only was in fact conveyed; and although there was a clause of bargain and sale of the mill contained therein, still there was a proviso, that on repayment of the principal and interest by *Burgess* to the plaintiff, the property was to be re-assigned to the former; and it is quite clear that as the mill was not mentioned in the former part of the deed conveying the land on which it stood, it could not pass by it. The land might be conveyed for one purpose, and the mill for another. If, therefore, the mill was a mere chattel, no distinction could be drawn between the conveyance of it by bargain and sale, and chattels of a different description: and it is a well known principle, that in the transfer of chattels, possession must accompany and follow the deed. This case is stronger than that of *Edwards v. Harben*, as here, the bargain and sale of the mill was by way of pledge, and there cannot be a conveyance by way of pledge, without possession, as it is the transfer alone that can make a pledge a security. Where, by the terms of an agreement, or from the nature of a transaction, property conveyed is to remain in the hands of the pledgee, it comes within the operation of the rule laid down in *Edwards v. Harben*. The case of *Horn v. Baker*, is beside the present question, and although it was there held that the pledgor might retain possession according to the deed, still, unless it contained an express

1830.

STEWART  
v.  
LOMBE.

1890.

STEWART  
v.  
LONGB.

provision to that effect, it would be void as against a creditor. There too, the question arose under the statute 21 Jac. 1. c. 19, as to whether a bankrupt was the reputed owner under the provisions of that act;—and the Court held, that those articles which were fixed, did not pass to his assignees, but that all the moveables did, as being left by the true owner in the possession of the bankrupt. Here, there was no lease or other instrument to shew that *Burgess* was to have the enjoyment of the mill. It is true, that if a deed or conveyance be conditional, the vendor's continuing in possession does not avoid it, because by the terms of the conveyance the vendee is not to have the possession till he has performed the condition; but here the conveyance of the mill was absolute, and there was no clause in the deed by which *Burgess*, as the pledgor, could be entitled to a repossession of it, the time for the repayment of the money having elapsed. If he were merely to have retained the possession for a given time or purpose, it would have been different, but an absolute conveyance, by way of mortgage, is not like the case of an execution, where the property is put up to public sale: and the ground on which *Kidd v. Rawlinson* (a) was decided, was, that a purchaser at such sale is protected, although the person whose goods were seized remains in possession; on account of the notoriety of the sale. This, therefore, is a stronger case than that of *Edwards v. Harben*, as here the property was pledged for the sole purpose of securing the repayment of the money advanced to *Burgess* by the plaintiff as mortgagee.

Lord Chief Justice DALLAS.—The first question in this case is, whether the mill was a fixture? The Jury have found that it was not. Whether a barn or mill, or any erection of a similar description, be a fixture or not, is partly a question of fact, and partly of law. When facts are ascertained, the Court will apply rules of law to them, as they are

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(a) 2 Bos. & Pul. 59.

to be collected from previous decisions; but every case of this description must depend on its own peculiar circumstances. Lines of distinction have been drawn between different parties, as between landlord and tenant, heir at law and executor, and creditors of mortgagor and mortgagee, as to what shall or shall not be deemed fixtures. For the purpose of the present decision, however, it is not necessary to enquire whether the mill in question were a fixture or not. That might be a question of great nicety, but I am willing to take it as properly found by the Jury, that it was not. If it were necessary to doubt that finding, the only effect would be, to send this case down again to a new trial, but for the reason before stated, I do not think that it requires a second consideration. If it be not a fixture, but a mere chattel, the only remaining question is, whether it passed under the mortgage deed? I am clearly of opinion that it did, for by a former part of the deed, lands were conveyed, and the mill was described as standing on one of the closes at the time. It therefore passed as being either nominally or locally interested with the land. It is consequently immaterial to consider whether it passed as a fixture and part of the realty, as it is sufficient to advert to the nature of the property; for it was not only connected with the land, but described as being situate on it in the mortgage deed. It has been said, however, assuming it to be a chattel, that possession has not been taken by the plaintiff, as mortgagee, nor did it accompany or follow the deed; and the case of *Edwards v. Harben* has been referred to, to shew that actual possession is necessary in the transfer of chattels. This, however, is not a case in which possession could be taken as in the ordinary transfer of other chattels, such as household furniture or stock in trade, of which possession could be separately and immediately delivered; for, whether in point of law the mill was removeable or not, still it was fastened and affixed to the land. It is also to be observed, that the present question does not arise on the bankrupt laws, nor is it a case in which possession and reputed ownership have

1820.

STEWART  
v.  
LONER.

1830.  
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STEWART  
v.  
LOMBE.

tended to procure a false credit. Even if it had, I should be of opinion that the mill in question is not a property of such a description as would fall within the statute of *James*; and at all events it would be extremely difficult to say, that the transfer of it by way of mortgage, would afford any means of giving false credit. Here, however, the question purely and solely arises as between a mortgagor and mortgagee. Although the case of *Edwards v. Harben*, has not been over-ruled, still it has frequently been dissented from, and was much narrowed by the subsequent decision of this Court in *Kidd v. Rawlinson* (a). There, there was a bill of sale, and the purchaser permitted the party who gave the bill to continue in possession; and it was held, that the property still remained in the purchaser. Here, the conveyance was by mortgage, and the mortgagee permitted the mortgagor to continue in possession, as was allowed the person whose goods were sold, in *Kidd v. Rawlinson*. That case, therefore, appears to me to draw the true line of distinction. In *Edwards v. Harben*, goods merely were transferred, which might be reduced into immediate possession, without inconvenience; but the mill in question is a chattel of a wholly different description. Besides, it was conveyed to the plaintiff as a conditional pledge for the repayment of the money he had advanced to *Burgess* by way of mortgage. The constructive possession of the land under the deed, was a sufficient possession or taking of the mill standing on it, and more particularly so, as the conveyance was not absolute, but merely conditional, namely, until the principal sum lent had been repaid with interest. Considering, therefore, the nature of the property, and the terms of the deed of conveyance, I am of opinion that the only possession possible in a case of this description, did follow the deed, and am therefore satisfied that the verdict found for the plaintiff must stand.

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(a) 2 Bos. & Pul. 59.

Mr. Justice PARK.—In deciding this case, I do not consider it necessary to touch on those which have been determined as to what shall be considered fixtures or not, as between landlord and tenant, or an heir and executor; I shall therefore confine myself, as my Lord Chief Justice has done, to the mere question of possession. If the decision in the case of *Edwards v. Harben* be law, although doubts have been since entertained as to the extent of the doctrine there laid down, namely, that actual possession must accompany the deed, this case might be considered as falling within it. But the mill in question has been compared to mere personal chattels, which pass from hand to hand, or articles left in the possession of a bankrupt, by which he is enabled to hold out a false credit. But it is quite inconsistent to suppose, in a case like the present, where there has been a conveyance of land by way of mortgage, for a term of one thousand years, and the mill standing on it at the time the deed was executed, that the mortgagor, a miller in actual occupation, and carrying on his business in the mill, must give up the possession to the mortgagee on the execution of the deed, and that he must enter immediately. Cases of this description stand on their own peculiar circumstances, and it appears to me to be sufficient to say, that by the deed, the lands of *Burgess* were conveyed to the plaintiff by way of mortgage, and that the possession by the former was consistent with the deed. The mill was incident to the lands, and the mortgagor, a miller, was allowed to continue in possession for the purpose of exercising his trade. If he had been turned out by the mortgagee, it would in all probability have defeated the object of the deed. It does not appear that any fraud whatever has been exercised between the parties, or false credit created; and I therefore concur in thinking, that the verdict found for the plaintiff must stand.

1820.

STEWART  
v.  
LOMB.

1820.  
  
 STEWARD  
 v.  
 LONNE.

Mr. Justice BURROUGH.—The only question in this case is, whether a mill, the property of *Burgess*, and of which he continued in possession, can be taken under a *feri facias*, for a debt due from him to one of his creditors? The title of the land on which it stood was in him. It is clear the mill passed to the plaintiff as mortgagee by the deed, and the only doubt is, whether the possession by *Burgess* was fraudulent or not. It cannot be so considered, as his interest both in the land and mill were conveyed to the plaintiff, as mortgagee. I therefore am of opinion, that the possession by *Burgess* was consistent with the transaction, and should even think, that if he had made no conveyance whatever, the mill could not be taken in execution under a writ of *feri facias*, under the facts of this case; for it appears to me to be in the nature of a fixture. In *Horn v. Baker* (a), the stills were set in brick-work, and let into the ground. Some of the vats were supported by and rested on brick-work and timber, but were not fixed to the ground, and others stood on horses or frames made of wood, which were not let into the ground, but stood upon the floor. The plaintiff there was the widow and executrix of the testator, and the defendants assignees of a bankrupt, who continued in possession; and the Court there drew a distinction between those articles which might be considered as fixtures (and of which description the mill in question might be deemed), and those which might be easily transferred, and held, that those which were fixed, were not in the possession of the bankrupt, so as to pass to his assignees, but that those which were not fixed did pass to them, as being left by the owner in his disposition.

Mr. Justice RICHARDSON.—*Burgess* being seised in fee of several closes of land, mortgaged them to the plaintiff for a term of years, on one of which he had previously caused the mill in question to be erected. In the deed con-

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(a) 9 East. 215.

veying the land, there was introduced a clause of bargain and sale of the mill, without which, it would have passed to the plaintiff, as mortgagee;—as in the former part of the deed, by which the close was conveyed, it was stated by way of caution, that the mill was erected and placed on it by *Burgess*. If he had died, the interest in the mill would have gone to his heir, and not to his executor. If he had conveyed the land, without mentioning the mill, the purchaser would be entitled to it; although it might be otherwise, if he had been a mere tenant for years. Though it was erected by him for the purpose of carrying on his trade, he could not dispose of or remove it, as against the mortgagee. In *Poole's case* (a), it was held, that the vats of a soap-boiler, erected for the purpose of carrying on his trade, might be seized by the sheriff as a chattel, but the sheriff could not take any article but what a tenant in possession would be entitled to remove. Here, if the mortgagee could not take the mill from the land, without the assent of the mortgagor, neither could the sheriff. This point however, is only a ground for a new trial. Although the Jury have found that the mill was not a fixture, still their verdict may be sustained, although it be not a parcel of the freehold; and even if it be not annexed to the land, it does not fall within that description of chattels to which the rule laid down in *Edwards v. Harben* is applicable; for it was confined to that species of goods which pass from hand to hand, the possession of which usually accompanies the transfer, and not, as in this case, where the property in the mill may be vested in the mortgagee, and the possession remain with the mortgagor. Besides, no false credit was held out by the occupier's not being actually the owner. The cases of *Kidd v. Rawlinson* and *Watkins v. Birch* (b), shew that actual possession, in the transfer of chattels, is not necessary in all cases, to accompany or follow the deed. Here,

1820.

STEWART  
v.  
LOWE.

(a) 1 Salk. 368. — (b) 4 Taunt. 823.



1820.  
 STEWARD  
 v.  
 LOMBE.

the mill could not be removed without great inconvenience, or the party's sustaining an injury. It would not only be a great personal inconvenience to the mortgagee to be compelled to occupy, but he would also thereby deprive the mortgagor of the fruits of his trade, which would enable him to pay the interest, and perhaps eventually the principal sum advanced to him. I am therefore of opinion, that the verdict for the plaintiff must stand, notwithstanding the Jury have found that the mill in question was not a fixture.

Rule discharged.

Friday,  
 Feb. 11th.


WILLIAMS v. THACKER.

The defendant was arrested in this Court, after a non-pros in the *Exchequer* for the same cause of action:—Held, that he was entitled to be discharged on entering a common appearance, as the plaintiff did not shew that the second arrest was not vexatious.

MR. Serjt. *Lens*, on a former day in this Term, had obtained a rule *nisi*, that the bail bond which had been given in this case might be delivered up to be cancelled, and the defendant discharged on entering a common appearance, on the ground that he had been arrested twice for the same debt. The defendant swore, that he had been arrested, in 1815, by process out of the Court of *Exchequer*, for £220, for board and lodging, and that that action was not discontinued, and that he was again arrested, by process out of this Court, in 1819, for the same debt.

Mr. Serjt. *Onslow* now shewed cause, and stated, that the action in the *Exchequer* had been non-prossed; and he relied on the case of *Turton v. Hayes (a)*, where it was held, that after a non-pros, the defendant must find bail to the second action; and the Court there thought, that the plaintiff suffers enough by paying costs in the first action, and therefore ought not to be in a worse condition than before.

But, *Per Curiam*:—The rule for preventing a second arrest for the same cause of action, was formerly so rigidly adhered to, that where the plaintiff was non-prossed for want of a declaration, he could not afterwards have arrested the defendant in a second action for the same cause. But a different practice now prevails; for it is said, that the plaintiff suffers enough by paying costs in the first action. So, where the plaintiff, having misconceived his action, moved to discontinue on payment of costs, he may, after the costs are taxed and paid, take out a new writ for the same cause, and arrest the defendant *de novo*.—*Bates v. Barry* (a). But as it does not appear here, on what ground the action in the *Exchequer* was non-prossed, or that the action in this Court was not vexatious, which must be presumed, unless the contrary be shewn, the rule must be made

1820.  
  
 WILLIAMS  
 v.  
 THACKER.

Absolute, but without costs (b.)

(a) 2 Wils. 381.—(b) See *S. P. Archer v. Champneys*, ante, vol. iii. page 607.

GRAHAM, Plaintiff, ———, Deforciant.

Friday,  
 Feb. 11th.

Mr. Serjt. Peake moved that this fine might pass, the acknowledgment of which had been taken at *Nice*, before the Vice-Consul and a Commissioner there. At the back of the *dedimus*, a general reference was made to a schedule annexed, to which the Commissioners had omitted to put their signatures.

If, in taking the acknowledgment of a fine abroad, a schedule be referred to on the back of the *dedimus*, as being annexed, such schedule must be signed by the Commissioners.

But the Court held, that it was necessary for them to have signed the schedule, and that the rules relative to the passing

1820.  
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 GRAHAM,
 Plaintiff.

of fines should be most strictly adhered to, in order to prevent those irregularities which were so frequently complained of.

The learned Serjeant, therefore, took nothing by his motion.

Friday,
 Feb. 11th.

BUTTERTON v. FURBER and Others.

By the 43 *Eliz. c. 2. s. 19*, a defendant in replevin is entitled to recover treble damages, with his costs also:—
 Held, that parish officers avowing on a distress for poor rates under that statute, are only entitled to single costs.

THIS was an action of replevin. The defendants avowed as parish officers under the 43 *Eliz. c. 2.* on a distress for poor rates, due for a farm in the occupation of the plaintiff; and at the last Assizes for *Stafford*, they obtained a verdict, damages one shilling.

Mr. Serjt. *Hullock*, on a former day in this Term, had obtained a rule *nisi*, that the Prothonotary might tax the defendants treble costs, under the nineteenth section of that statute (*a*), and submitted, that in terms, it extended to treble costs, as well as damages. He cited the cases of *Lawson v. Story* (*b*), and *Okely v. Salter* (*c*).

Mr. Serjt. *Vaughan* (with whom was Mr. Serjt. *Lawes*) now shewed cause. The rule is, that where a party is entitled to single damages at common law, if treble damages

(*a*) By which it is enacted, that “after issue tried for the defendant, or nonsuit of the plaintiff after appearance, the same defendant is to recover treble damages, by reason of his wrongful vexation in that behalf, with his costs also in that part sustained, and that to be assessed by the same Jury, or writ to enquire of the damages, as the same shall require.”

(*b*) 1 *Ld. Raym.* 19. 5. C. *Carth.* 331. 1 *Salk.* 205.—(*c*) *Noy*, 137. S. C. *Ycle.* 176.

be given by statute, treble costs follow; but where no damages are recoverable at common law, as here, but treble damages are only given by virtue of the statute, the party is not entitled to treble costs. The statutes 7 Hen. 8. c. 4. s. 3. and 21 Hen. 8. c. 19. s. 3. which give a defendant in replevin damages in certain cases, are inapplicable to the present, as they do not extend to a distress for poor rates; and the 43 Eliz. which is a penal statute, merely provides, that after issue tried for the defendant, he shall recover treble damages, *with his costs also*. Although, therefore, the statute expressly gives treble damages, yet it is clear that it was only intended to give single costs; and in *Okely v. Salter* (a), it was determined that the defendants were not entitled to treble costs, but only treble damages under the nineteenth section of that statute (b).

1829.
BUTTERTON
v.
FURBER.

Mr. Serjt. *Hullock*, in support of the rule.—The case of *Okely v. Salter* is also reported in *Yelverton* (c), where the point as to costs is not mentioned; and it is not intelligibly stated by *Noy*. The former reporter states, that the statute of *Elizabeth* is not penal, but to be construed largely, because it tends to *opus charitatis*. In the case of *Lawson v. Story*, which turned on the statute 2 & 3 Will. & Mary, sess. 1. c. 5. s. 4. (d), treble costs were given, as well as

(a) *Noy*, 157.

(b) Mr. Prothonotary *Ray* mentioned the case of *Hempson v. Josselyn and others**, where the defendants insisted that they were entitled to treble costs, under circumstances precisely similar to the present, and the opinion of Mr. *Tidd* was taken, who thought that the 19th section of the 43 Eliz. gave single costs only, as no damages were before recoverable by the common law, by a defendant in replevin.

(c) Page 176.

(d) By which it is enacted, "that upon any pound-breach, or rescous of goods distrained for rent, the person grieved thereby, shall, in a special action upon the case, for the wrong thereby sustained, recover his treble damages, and costs of suit, against the offender in any such rescous or pound-breach, or against the owner of the goods distrained, in case the same be afterwards found to have come to his use or possession."

* MS. December 17th, 1798.

1820.

BUTTERTON
v.
FURBER.

damages. It is true, that in that case single damages were recoverable at common law; but that circumstance does not appear to have been noticed by the Court. If, therefore, the party was deemed entitled to treble costs in that case, so, by parity of reasoning, must the defendants here, for although the statutes of *Elizabeth* and *Will. & Mary*, are not precisely the same in words, still they are in substance, as by the one, the party is entitled to recover treble damages, with costs also, and by the other, the like damages and costs of suit.

Lord Chief Justice DALLAS.—It seems to me there can be no doubt on the construction of the statute of the 43 *Eliz. c. 2.* or of the decision in the case of *Okely v. Salter* (a). The only question is, whether, if a statute give treble damages, in a case where single were not recoverable previously thereto at common law, treble costs are also to be intended? I own I can see no reason for such an inference. The statute of *Elizabeth* provides, that the defendant shall recover treble damages, with his costs also. It is therefore reasonable to presume, that he shall not be entitled to treble costs, as treble damages are sufficiently penal. The statute of 2 & 3 *Will. & Mary* is wholly distinguishable, as the costs were there so connected with the damages, that it is impossible to separate them, being conjoined by the word *and*. There too, single damages were before recoverable at common law. But, independently of that, the case of *Okely v. Salter* appears to me to be a direct authority against the defendant's application.

Mr. Justice PARK.—I am of the same opinion. The words of the statute of *Elizabeth* appear to me to be decisive, and are altogether different from those in *Will. & Mary*,

(a) *Noy*, 137.

where the costs and damages are united by the copulative conjunction *and*. Here, the word *with* is used in the disjunctive sense, and it must be inferred to refer to costs usually recovered. If *Lawson v. Story* be correctly reported by Lord *Raymond* (a), still it is beside the present question; and I concur with my Lord Chief Justice, that the case of *Okely v. Salter* appears to be accurately reported by *Noy*, and therefore am of opinion that the Prothonotary was right in allowing the defendants single costs only.

1820.
BUTTERTON
v.
FURBER.

Mr. Justice BURROUGH concurred.

Mr. Justice RICHARDSON.—This case is altogether distinguishable from that of *Lawson v. Story*, as not only the statutes may bear a different construction, but in the one, damages were recoverable at common law, and in the other not. The statute of *Elizabeth* gives treble damages, with costs, and according to the decision in *Noy*, single costs only are recoverable. The report of that case appears to me to be correct, although *Yelverton* did not notice it, but confined himself to the principal point only—namely, that treble damages ought to be assessed by the Jury.

Rule discharged.

1820.

Friday,
Feb. 11th.

WILLIS v. PECKHAM.

A witness attending a trial under a *subpoena*, is not entitled to a compensation for his loss of time, although the party requiring his attendance expressly promises to pay him for such loss.

THIS was an action of *assumpsit*, brought to recover from the defendant a compensation for the plaintiff's loss of time in attending as a witness, at a trial at *Westminster*, under a *subpoena* served on him by the defendant for that purpose. The declaration stated, that an issue was depending in the *King's Bench*, at the suit of the defendant, against one *Coles*, and about to be tried at *Westminster*, in which action a writ of *subpoena* had been served on the plaintiff, commanding him to appear before the Chief Justice there, on a certain day, to testify the truth, according to his knowledge, in that action, on the part of the plaintiff (the now defendant). The plaintiff then averred, that the issue being about to be tried, and he having been served with the *subpoena*, the defendant promised to pay him for his loss of time on that occasion; that the plaintiff attended at *Westminster* ten days, and was there ready to be examined as a witness on the trial, in obedience to the writ of *subpoena*, and that he therefore reasonably deserved to have the sum of £20 for his loss of time on that occasion; and that although a reasonable time for the payment for such loss hath long since elapsed, yet that the defendant had not paid the same, but still refused so to do. To this was added a count for money had and received. Plea *non-assumpsit*.

At the trial of the cause before Lord Chief Justice *Dallas*, at *Westminster*, at the Sittings after the last Term, it appeared that the plaintiff was a carpenter, and that the defendant, after serving him with a *subpoena* in the action brought by him against *Coles*, promised to pay him for his loss of time in attending the trial; that the plaintiff attended six days, and gave his evidence, but that the cause was ul-

timately referred, and an award given in favour of the defendant; that the defendant's attorney charged in the bill of costs £3 for the plaintiff's loss of time, being the sum demanded by him, at the rate of ten shillings *per* day, which sum was paid by *Coles* to the defendant, but which he did not pay over to the plaintiff. The Master, however, in taxing the costs, did not allow that sum for loss of time, but under the head of the general expences of the witnesses. It did not appear that the plaintiff had incurred any expences, as refreshments, &c. had been daily provided by the defendant, and the only question was, whether the former was entitled to remuneration for his loss of time? His Lordship was decidedly of opinion that he was not; but the Jury found a verdict for him, damages £3:—Leave however was given the defendant to move to set it aside, and have a nonsuit entered, if the Court should be of opinion that the action was not maintainable.

1820.

 WILLIS
 v.
 PECKHAM.

Mr. Serjt. *Lens*, on a former day in this Term, accordingly obtained a rule *nisi*, and observed, that the Master of the Court of *King's Bench* on taxation, had not allowed the costs as for loss of time, and that witnesses attending the trial of causes, were not entitled to remuneration *eo nomine*, either for expences, or loss of time, except surveyors, and other professional men, who were particularly entitled to a compensation for such loss; and that the promise of the defendant to pay must be considered as a *nudum pactum*, and without consideration, as the plaintiff was not entitled to recover a compensation at law for such loss, as the attendance of witnesses at a trial was a public duty, which one individual owed another for the furtherance of justice.

Mr. Serjt. *Vaughan*, and Mr. Serjt. *Bosanquet*, now shewed cause. The Jury having found a verdict for only

1820.

 WILLIS
 v.
 PECKHAM.

£3, the Court will not now interfere. Besides, the defendant has actually received the money charged for the plaintiff's loss of time, and refused to deliver it over to him, although the Master, on taxation, allowed it under the charge of general expences. The defendant, therefore, cannot retain it, but the plaintiff is entitled to it, either on the count for money had and received, or on the defendant's express promise to pay him, after the *subpana* was served.

Lord Chief Justice DALLAS.—The verdict found by the Jury was expressly contrary to my opinion. The plaintiff incurred no expences during his attendance at the trial, as all his refreshments were paid for by the defendant. Besides, he had no distance to come. He was *subpanaed* by both parties, and the Master allowed the sum in question under the general expences of the witnesses, and stated expressly that he did not do so for loss of time. The plaintiff was bound to attend and remain till the cause was called on, to give evidence under the *subpana*. It cannot, therefore, be supposed for a moment, that there was any consideration on which to raise an *assumpsit* by the defendant.

Mr. Justice PARK.—It was decided, in the case of *Moor v. Adam* (a), that a compensation to a person for a loss of time in attendance as a witness, is only allowed to medical men and attorneys.

Mr. Justice BURROUGH concurred.

Mr. Justice RICHARDSON.—It appears that during the argument in *Moor v. Adam* (b), Lord Ellenborough having referred to a note of a case in the Master's Book, of *Lowry*

(a) 5 Maule & Selw. 156.—(b) *Id.* 159.

v. Doubleday, as to a compensation to witnesses coming from abroad, observed, "that he believed the practice had been to make allowance to medical men and attorneys, but not to others."

1820.
WILLIS
v.
PECKHAM.

Rule absolute (a).

(a) See *Schimmel v. Lousada*, 4 Tunt. 695.

CARVICK v. BLAGRAVE.

Saturday,
Feb. 12th.

THIS was an action of covenant for rent in arrear, brought by the plaintiff as assignee of one *Seth Thomas*, against the defendant, the immediate lessee of *Thomas*. The declaration stated, that *Thomas*, before and at the time of making the indenture of demise thereafter mentioned, was lawfully possessed of certain premises thereafter mentioned to have been demised to the defendant, that is to say, for the residue and remainder of a certain term of twenty-two years, commencing from the 25th of *December*, 1797, to come and unexpired therein, and that being so possessed thereof, he, *Thomas*, afterwards, to wit, on the 7th of *March*, 1811, by an indenture made between himself of the one part, and the defendant of the other, demised the said premises to the defendant, to hold the same to him from the 20th of *December* then last past, to the full end and term of nine years then next ensuing, at the yearly rent of £420, payable quarterly. Then followed a covenant by the defendant with *Thomas*, for the payment of the rent. The declaration then stated the defendant's entry into the premises

In covenant for non-payment of rent, on an indenture, by the assignee of the lessor against lessee, the declaration alleged, that the lessor was possessed for the remainder of a term of twenty two years, commencing from the 25th *December*, 1797, and that on the 7th *March*, 1811, he, by indenture, demised to the defendant to hold from the 20th *December* then last past. Plea, that the lessor was not at the time of making the indenture, possessed for the

residue of the said term *modo et formâ*: Held, that such plea was good on general demurrer, as the averment in the declaration was material and traversable.

1820.

CARYICK
v.
BLAGRAVE.

by virtue of the indenture, and that he was and still is possessed thereof. The plaintiff then averred, that after the making the said indenture, and during the term thereby granted, to wit, on the 14th *August*, 1814, *Thomas*, being so possessed of the premises for the residue and remainder of the said term of twenty-two years, subject to the said term of nine years, by his said other indenture made between himself of the one part, and the plaintiff of the other;—*Thomas*, for the considerations therein mentioned, granted, bargained, sold, assigned, transferred, and set over the premises, and all his estate, right, title, and interest therein to the plaintiff, to hold to him during the residue and remainder of the said term of twenty-two years. By virtue of which last mentioned indenture the plaintiff became and was, and from thence hitherto hath been, and still is possessed of the premises for the remainder of the said term of twenty-two years, subject as aforesaid. The plaintiff then averred a performance of covenants on his part since he became possessed of the premises, and assigned for breach, that after the making of the first mentioned indenture, and during the term thereby granted, and since the plaintiff was possessed, to wit, on the 20th of *March*, 1819, the sum of £525, for one year and a quarter's rent, ending on that day, was due from the defendant to the plaintiff.—Plea in bar, that *Thomas* (the defendant's lessor) was not, at the time of making the said indenture of lease in the said declaration mentioned, possessed of the said demised premises for the residue and remainder of the said supposed term of twenty-two years, in manner and form as the plaintiff had above in his declaration in that behalf alleged. To this plea the plaintiff demurred generally, and the defendant joined in demurrer.

The cause came on for argument on a former day in this Term, when Mr. Serjt. *Pell*, in support of the demurrer, submitted, that the defendant was estopped by his deed, and precluded from pleading in bar, that *Tho-*

mas, his lessor, was not possessed of the residue of the term at the time of making the lease. The justice of the case was clearly with the plaintiff, for the defendant not only accepted the lease, but took possession and occupied the premises under it, if not, he might have pleaded an eviction. The substance of the allegation in the declaration is, that *Thomas*, being lawfully possessed of premises for the residue of the term of twenty-two years, demised them to the defendant; and that *Thomas's* reversionary interest was afterwards assigned over to the plaintiff, and the defendant, by his plea, put in issue the extent of such interest, which he was estopped from doing, whether he were, in fact possessed or not; for, in *Trevivan v. Lawrance* (a) it was held, that "where an estoppel works on the interest of the lands, it runs with the land into whose hands soever the land comes." If *Thomas* had brought an action previous to the assignment, and not set forth the assignment in his declaration, the defendant could not have pleaded that he was not possessed. As, therefore, an estoppel, running with the land, is not traversable; and the defendant was estopped from doing this as against *Thomas*, he is equally estopped as against his assignee, who has in fact the same right as his assignor; for in *Coke Littleton* (b), it is said, that "privies in blood, as the heir, privies in estate, as the feoffee, lessee, &c. privies in law, as the lords by escheat, &c. shall be bound, and take advantage of estoppels." It is quite clear that the allegation in the declaration could not be traversed by the defendant, but he has in fact traversed it, for his denial is tantamount to a traverse; for in *Lambert v. Stroother* (c), Lord Chief Justice *Willes*, in delivering the opinion of the Court, observed, that "the distinction between traverses and denials, which we meet with in some of the books, is a distinction without a difference, for they are exactly the same thing." To try, therefore, whether it be traversable or not, this allegation that

1820.

CARVICK
v.
BLAGRAVE.

(a) 1 Salk. 376. — (b) 352. b. — (c) *Willes*, 324.

1820.
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 CARVICK  
 v.  
 BLAGRAVE.

*Thomas* was possessed of the residue of the term, is merely an inducement to the action, and need not be precisely alleged. It would have been sufficient for the plaintiff to have averred that *Thomas* was possessed, without shewing his title, or the nature of his interest; for, in *Comyn's Digest*, it is said, that (a) "if a title be only conveyance or inducement to the action, it need not be alleged specially; as in covenant, it is sufficient to say, that by indenture he demised, without shewing by what title he was seised;—or, that being possessed for years, he demised, without saying by what title, or for what term possessed." If so, the defendant cannot, by any form of pleading, tie the plaintiff down to the proof of the allegation for what precise term he was possessed; and more particularly so, as in this case it was laid under a *videlicet*, and therefore need not be proved precisely as laid; and it is quite clear that a traverse under a *videlicet* is bad, unless it be material. It must be taken, that the defendant enjoyed during the time he held under a demise from *Thomas*, who afterwards assigned to the plaintiff, as he has not pleaded an eviction. The defendant was actually in possession when the rent accrued, and could only hold the premises under the lease granted to him by *Thomas*. In *Parker v. Manning* (b), it was held, that in an action of covenant for rent on an indenture, brought by the assignees of the lessor, (a bankrupt), the lessee could not plead that the lessor *nil habuit in tenementis*; and Lord *Kenyon* there said (c), that "the justice and honesty of the case were with the plaintiffs, but that if indeed the defendant had been evicted, he could not have been compelled to pay rent, and that he might have pleaded that fact in answer to the plaintiff's demand." This being an action by the assignee of the lessor, who was possessed for the residue of a term, falls precisely within the sixth resolution of the Court in the case of *Palmer v.*

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(a) *Tit. Pleader*, C. 43. — (b) 7 *Term Rep.* 537. — (c) *Id.* 538.

*Ekins*, as reported by *Strange* (a), which was, that "if the plea did not amount to *nil habuit in tenementis*, yet it would be ill on account of the generality of the traverse, which tied up the plaintiff to prove the estate alleged in the declaration, when any other estate would do: even a disseisin would do in that case, where it appeared the tenant enjoyed under the lease. And it was no answer to say, that the defendant had traversed in the words of the declaration; for unless it be materially alleged, he is not to follow it." This therefore clearly shews, that an allegation of title in an action similar to the present, is immaterial, and cannot be traversed. The doctrine of that resolution was confirmed by Mr. Serjt. *Williams*, in a note to the case of *Goram v. Sweeting* (b), in which he observes, that "where the allegation is not at all material, the other side cannot traverse it." So, the defendant in this case is estopped from traversing the interest of his lessor by his plea, as he enjoyed the premises under the lease; and the plaintiff is therefore entitled to judgment.

1830.  
  
 CARVICK  
 v.  
 BLEGRAVE.

Mr. Serjt. *Blisset*, *contra*.—The plaintiff might have joined issue. There can be no question but that a lessee is estopped from saying that his lessor *nil habuit in tenementis*, at the time of granting the lease, but he is not estopped from saying that such title expired at a subsequent period. This plea therefore, does not amount to a plea of *nil habuit in tenementis*, as it does not go to the time of granting the demise, but only as to its duration, namely, that the lessor was not possessed for the remainder of a term of twenty-two years. The estoppel cannot exceed the length of time granted to the defendant, and the term in question exceeds that, and therefore the doctrine of estoppel cannot extend to the defendant as lessee. In *Palmer v. Ekins*, as reported by Lord *Raymond*, it appears that the Court (c), only came to three re-

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(a) 2 Str., 818. — (b) 2 Wms. Saund. 207 a. n. 24. — (c) 2 Ld. Raym. 1551.

1820.

CARVICK  
v.

BLAGRAVE.

solutions, first, that it was a material issue ; secondly, if not, it was rendered so by the plaintiff's statement in the declaration ; and, thirdly, that if it were not material, it could only be taken advantage of by special demurrer, and the point raised in the third resolution, in that case, is entirely extrajudicial, for it went to the interest the lessor had in the estate at the time of granting the demise, and not as to its continuance to the end of the term. Here, the plaintiff should have shewn that *Thomas* was possessed of the term, and that it was assigned to him by bargain and sale ; and the defendant might deny that *Thomas* had such an interest in the term as to enable him to pass it by bargain and sale. As between lessor and lessee, a mere allegation of title may be immaterial and surplusage, as it may be sufficient to allege possession generally ; but it is widely different in the case of an assignment, for an assignee must state a legal title on the record, and allege every fact material as to such title, or he cannot recover. Here, the defendant has traversed the whole of the averment in the plaintiff's declaration, and put in issue the duration of his term ; but he is not strictly confined as to the length of the term, but may dispute even its existence. In *Comyn's Digest* (a), it is said, that " the defendant may traverse any part of the declaration, which is material to the plaintiff's title ;" and in *Lord Crumwell's case* (b), it was held, that " if the plaintiff alleges that *A.* being seised, enfeoffed *B.* who died seised, and the land descended to his heir, who demised to him ; and afterwards *A.* ousted him, and disseised his lessor, and conveyed to the defendant ;—the feoffment, descent, or disseisin, may be traversed." Here, therefore, the plaintiff, having alleged *Thomas's* title, it is material and traversable. Even if this were an immaterial traverse, by statute 4 & 5 *Anne*, c. 16. s. 1, no exception could be taken to it, unless shewn for cause of demurrer (c). The sixth

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(a) *Tit. Pleader*, G. 10. — (b) *Dyer*, 365 b. — (c) *Com. Dig. tit. Pleader*, G. 22.

resolution in *Palmer v. Ekins*, as reported by *Strange*, is wholly extra-judicial, as the materiality of the traverse was not considered by the Court, neither was it referred to by Lord *Raymond*, who reported the judgment at full length. The defendant's plea, therefore, is good in substance, and he is consequently entitled to judgment.

1820.  
CARVICK  
v.  
BLAGRAVE.

Mr. Serjt. *Pell* in reply. It would be most unjust if the defendant could, from the nature of his plea, resist the payment of rent to the plaintiff, he having enjoyed the premises under the lease from him to *Thomas*, and never having been evicted. It is rather extraordinary that the sixth resolution in *Palmer v. Ekins*, as reported by *Strange*, was not noticed by Lord *Raymond*; but that resolution was adopted by Mr. Serjt. *Williams*, who was aware of both the reports, and he drew a distinction between that and Sir *Francis Leke's* case (a). In an action for use and occupation, the defendant having enjoyed, cannot dispute the title of his landlord. A distinction has been drawn here between a lessee and an assignee, but in the latter instance, it would be sufficient for the plaintiff to prove either payment of rent, or enjoyment of the premises under a lease. The allegation of the plaintiff therefore is neither material nor traversable, and need not be proved as laid. And whether the plea in question amounts to *nil habuit in tenementis*, or not, it is quite clear from the case of *Palmer v. Ekins*, as reported by *Strange*, that it is bad on general demurrer. But at all events, the defendant is estopped by the lease, from disputing the title of his lessor.

*Cur. adv. vult.*

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(a) *Dyer*, 366 a.



1820.  
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 CARVICK
 v.
 BLAGRAVE.

Lord Chief Justice DALLAS now delivered the following judgment of the Court.—The question in this case arises on a demurrer to the defendant's plea. The declaration states, that the plaintiff was the assignee of *Seth Thomas*, who, being lawfully possessed of certain premises for the remainder of a term of twenty-two years, commencing from the 25th of *December*, 1797, demised them to the defendant on the 7th of *March*, 1811, for nine years, from the 20th of *December* then last, at an annual rent, which the defendant covenanted to pay. The declaration then stated, that the defendant entered and took possession, and that on the 14th of *August*, 1814, *Thomas* assigned his interest in the premises to the plaintiff, subject to the defendant's lease:—By virtue of which, the plaintiff became possessed for the remainder of the term. The defendant as lessee, pleaded in bar, that *Thomas* was not, at the time of making the lease to the defendant, possessed of the premises for the residue and remainder of the supposed term of twenty-two years. General demurrer and joinder.

The objections to this plea appear to resolve themselves into two; First, that it amounts to this, namely, that the lessor, *Thomas*, had nothing in the premises. Secondly, that it puts in issue the precise extent of the term, which it is said, *Thomas* had in the premises. The first of these objections is wholly unfounded. It has been assumed, that the question is the same as it would have been if *Thomas* had brought the action, and alleged himself possessed of the term of twenty-two years, in the manner averred in the declaration. The answer to this is, that, in such an action by *Thomas*, the defendant would have been estopped from disputing the lease; and the Court must have treated such an allegation as mere surplusage, and not traversable by the lessee; for, as between him who had accepted the demise, and his lessor, it was totally immaterial what the title of the lessor was. Between them, the estoppel was in full force. So this estoppel has equal effect between the lessee and one

1820.

CARYCK
v.
BLAGRAVE.

who is privy, or, in other words, derives his legal title from the lessor. But the lessee is under no engagement, nor liable to any one but the legal assignee. The allegation of the possession by *Thomas*, for a term of twenty-two years, is made by the assignee, and not by *Thomas* himself; and the lessee has a right to know whether there is a privity between him and the assignee by means of a conveyance by the lessor of the true title. From the nature of the case, he cannot be prevented from putting in issue any material fact alleged by the assignee. The case of *Palmer v. Ekins* (a), was very different from the present. The Court there thought, that the plea amounted to a plea of *nil habuit in tenementis*, and it is admitted on all hands that such a plea is bad; there is no difference in substance between a general plea of *nil habuit in tenementis*, and a special plea of a like description. If the effect of the plea is to dispute the interest, which a lessee took under a lease from a lessor, the plea is bad, whatever shape it assumes. The present plea leaves the lease in the same state as the plaintiff has described it: and the defendant merely objects, that the title he has alleged as being assigned to him was not the true title.—The second objection is, that by the plea in question, the precise extent of the term stated in the declaration is put in issue, and that the plaintiff's title would be defeated, if it appeared that his term was not of the precise extent alleged. If that be so, it is the plaintiff's own fault. If the precise term is materially alleged, the defendant cannot be prevented from traversing it. But the Court are of opinion that such a consequence will not follow. The plea puts in issue the substance of the allegation, which is, that *Thomas*, being possessed of a term, made a derivative demise to the defendant. The substantial question, therefore, at the trial of such an issue, would be, whether *Thomas* had a larger term, out of which he could carve this lesser term? It is wholly immate-

(a) 2 Stra. 817. S. C. 2 Ld. Raym. 1550.

1820.

CARVICK

v.

BLAGRAVE.

rial whether it was a year, a month, or a day longer than the derivative term: any term for years, which left the reversion in him, and enabled him to assign, would satisfy the substance of the allegation in the declaration. The issue in this case, is joined on the very point of the plaintiff's title to recover, and therefore, according to the principle laid down in *Littleton* (a), and recognised in *Buller's Nisi Prius* (b), the plea, by traversing *Thomas's* possession of the term, in manner and form alleged, puts the issue on the very point of the action. The section in *Littleton* runs thus:—"To this it may be said, that these words (*modo et formā prout*, &c.) in many cases, are words of form of pleading, and not words of substance: for, if a man bring a writ of entry in *casu proviso*, of the alienation made by the tenant in dower to his disinherittance, and counteth of the alienation made in fee; and the tenant saith, that he did not alien in manner as the demandant hath declared, and upon this they are at issue; and it is found by verdict, that the tenant aliened in tail, or for term of another man's life, the demandant shall recover; yet the alienation was not in manner as the demandant hath declared, &c." The case of *Pope v. Skinner* (c), is to the same effect. Where the defendant in replevin avowed taking the plaintiff's cattle as *damage feasant* in *April*, the plaintiff pleaded in bar, that one *Williams* was seised of a house and land, &c. whereunto he had common, and demised the same to him on the 30th of *March*, to hold from the feast of the Annunciation next before, for a year. The avowant traversed the lease *modo et formā*, whereupon issue was taken, and the Jury found that *Williams* made a lease to the plaintiff on the 25th of *March*, for one year from thence next ensuing. And though this be not the same lease that the plaintiff pleaded, (for this begins on the day, and the other from the day): yet the Court gave judgment for the plaintiff, for the substance of

(a) Sect. 485.——(b) Page 300.——(c) *Hobart*, 72.

the issue was, whether the plaintiff had such a lease or not from *Williams*, as by force thereof he might use the common at the time? which appeared for him in this case, and the *modo et formâ* is not material.—So, in the present case, had it gone to trial, and the Jury had found that *Thomas* was possessed of a term of twenty-two years, wanting one day, the substance of the issue would have been found, and the plaintiff equally entitled to the reversion, and consequently to maintain his action.

1820.

CARVICK
v.
BLAGRAVE.

My Brother *Park* having been absent during the argument, has requested me to state that he has taken no part in the decision of the Court.

Judgment for the defendant.

GRILLARD v. HOGUE.

Saturday,
Feb. 12th.

MR. Serjt. *Vaughan*, on a former day in this Term, had obtained a rule *nisi* for a *mandamus* or commission to the Court in *India*, to examine witnesses on behalf of the defendant in this case, in pursuance of the stat. 13 Geo. 3. c. 63. s. 44 (a), and that the trial of this cause might be postponed until the examinations of such witnesses were returned, to—

By 13 Geo. 3. c. 63. s. 44, it is enacted that when and as often as the East India Company, or any person, shall commence and prosecute any action at law, for which cause has arisen in *India*, against any other person, in any of his Majesty's Courts at *Westminster*, such Court, on motion, may award a writ

(a) Which, after reciting that his Majesty's subjects were liable to be defeated of their several rights, titles, debts, dues, demands, or suits for which they had cause arising in *India*, against other subjects of his Majesty, and for preventing such failure of justice, enacted, "That when and as often as the *India* Company, or any person or persons whatsoever, shall commence and prosecute any action or suit at law or in equity, for which cause hath arisen, or should hereafter arise, in *India*, against any other person or persons whatever, in any of his Majesty's Courts at *Westminster*, it shall and may be lawful for such Court respectively, upon

of *mandamus* for the examination of witnesses in *India*:—Held, that a defendant might apply for such writ, as well as a plaintiff.

1820.
GRILLARD
v.
HOGUE.

gether with certain letters, written by the plaintiff, which were also in *India*. The defendant made an affidavit that the depositions of three witnesses were absolutely necessary for his defence.

Mr. Serjt. *Lens* now shewed cause, and observed, that the application was unnecessary, as there had been proceedings in Chancery for an injunction, and a similar application made there, which had been granted by the Lord Chancellor. Besides, this Court is not authorised to grant a *mandamus* or commission, on the application of a *defendant* in a case of this description; as by the forty-fourth section, persons *commencing* or prosecuting actions at law, are only entitled to have such writ awarded—and a distinction is drawn between civil suits and criminal proceedings; for, by section forty (*b*), in cases of indictment or information, a motion may be made for a *mandamus*, either by the prosecutor or defendant; it is therefore clear that the forty-fourth section, on which this application is founded, is confined to the cases of plaintiffs alone, having a cause of action against defendants in this country. The reason is manifest, for, before this statute, a plaintiff had no remedy

motion there to be made, to provide and award such writ or writs, in the nature of a *mandamus* or commission to the Chief Justice and Judges of the Supreme Court of Judicature for the time being, or the Judges of the Mayor's Court at *Madras*, *Bombay*, or *Brussels*, as the case may require, for the examination of witnesses as aforesaid; and such examination being duly returned, shall be allowed and read, and shall be deemed good and competent evidence at any trial or hearing between the parties in such cause or action."

(*b*) By which it is enacted, "That in all cases of indictments or informations laid or exhibited in the Court of *King's Bench*, for misdemeanors or offences committed in *India*, it should be lawful for his Majesty's said court, upon motion, to be made on behalf of the prosecutor, or of the *defendant*, to award a writ of *mandamus*, requiring the Chief Justice and Judges of the said Supreme Court of Judicature for the time being, who were thereby respectively authorised and required accordingly to hold a Court, with all convenient speed, for the examination of witnesses, and receiving other proofs concerning the matters charged in such indictment or information respectively."

whatever, but the defendant had, as he might apply to the Court to stay proceedings, which would be granted if the necessity of his case required it.

1820.

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GILLARD
v.
HOGUE.

Mr. Serjt. *Vaughan*, (with whom was Mr. Serjt. *Taddy*) in support of the rule, were stopped by the Court.

Lord Chief Justice DALLAS.—It seems to me necessary to consider, in the first place, what the statute has provided for; if the enactment be express, the Court cannot go into an equitable construction of it, neither can they interfere, and if the defendant is thereby placed in a different situation from the plaintiff. But it appears to me, that it would be most unreasonable if such a distinction were to prevail. Of the justice of the case there can be no doubt. Both parties should stand on an equal ground. Why then should the plaintiff be furnished with this weapon of attack, and the defendant have no shield to protect himself from it? On the equitable construction of the statute, I have no doubt but that it was intended to confer mutual remedies. I at first thought that from the length of time which has elapsed since the statute was passed, some decision might have taken place on the construction of it as to this point. None, however, has been referred to, but it has been insisted, that the defendant had his remedy, as the Court might stay the proceedings on his part, if necessary. Although there may be some weight in this observation, still it does not appear to me to outweigh the object of this statute, by which it was intended, that it should be competent to either party to apply for a writ of *mandamus* to examine witnesses in *India*.

Mr. Justice PARK.—I am of the same opinion.—This is a remedial statute, and passed for the furtherance of justice, which would be prevented, if the objections raised by my Brother *Lens* were to prevail. It appears to me, that both from the justice of the case, and the intention of the legislature, that both a plaintiff and defendant may have a

1820.

GRILLARD
v.
HOGUE.

similar remedy in civil proceedings, as was expressly given them in the cases of indictment or information—although the forty-fourth section is not framed in so express terms as the fortieth. But it would be most unjust if a plaintiff alone should be entitled to this privilege, and that a defendant should have no remedy whatever; I therefore think that this rule must be made absolute.

Mr. Justice BURROUGH.—This statute was passed in furtherance of justice, in order to obviate the difficulty that before existed as to examining witnesses in *India*. In cases of indictment or information, both parties are expressly mentioned, and in that relating to actions at law, it is not stated that plaintiffs alone are entitled to apply for a *mandamus*, or that defendants are excluded from so doing. It is fair, therefore, for the Court to imply, that the legislature intended to extend the same privilege to defendants as plaintiffs in civil suits, as was done in cases of a criminal nature, and of the justice of the case there can be no doubt whatever.

Mr. Justice RICHARDSON.—The enacting words of a remedial statute are frequently extended—and as the legislature have expressly placed plaintiffs and defendants on the same ground, in cases of criminal proceeding; it may very fairly be inferred that they intended to do so in actions at law, or suits in equity.

Rule absolute (a).

(a) See *Francisco v. Gilmore*, 1 Bos. & Pul. 177, where a similar application was made by a *defendant*, the captain of an *Indian* trader, on the ground that the cause of action did not arise in *India*, and no objection was made as to his not being entitled to make the application.

1820.

KINGSTON v. LLEWELLYN and BELCHER.

Saturday,
Feb. 14th.

MR. Serjt. *Omslow*, on a former day in this Term, had obtained a rule *nisi*, that the writ of *capias ad respondendum*, which had been issued in this cause, might be quashed, the bail bond given up to be cancelled, and all further proceedings stayed, on the ground of irregularity, the christian names of the defendants having been omitted in the writ, which directed the sheriff to take Messrs. *Llewellyn* and *Belcher*.

By a writ of *capias ad respondendum*, the sheriff was directed to take Messrs. *C.* and *D.* without mentioning their christian names. They afterwards signed a bail bond in their christian and surnames, which was duly executed:—Held, a waiver of their irregularity in the writ.

MR. Serjt. *Pell* now shewed cause, on an affidavit which stated, that the defendants were arrested on the 30th of December last, on a *capias*, returnable in eight days of St. Hilary (30th of January), and that the declaration was filed on the 24th; that on the 8th of January the plaintiff applied to the defendants, who promised to give a warrant of attorney; that on the 11th, he requested them to execute it; that one of them sent an answer on the 18th, stating that his partner (the other defendant) was out of town, and that it should be executed on his return; that on the 20th, both the defendants called on the plaintiff, and said they would sign the warrant of attorney, but afterwards declined to do so; and that on the 27th, they called again, and promised to settle the business, which however they did not do. The defendants had duly signed the bail bond, in their christian and surnames, which was assigned on the 29th. Under these circumstances, the learned Serjeant contended, that as the present application was not made till the 8th instant, it was a waiver of the irregularity in the writ; or that, at all events, the subsequent proceedings by the defendants, in promising to execute a warrant of attorney, and having regularly signed the bail bond, was a complete answer to the application.

1820.

 KINGSTON
 v.
 LLEWELLYN.

Mr. Serjt. *Onslow*, in support of the rule.—The application by the defendants need not have been made earlier, as in *Dand v. Barnes* (a) it was held, that a defendant may move to set aside the service of a writ for irregularity at any time before a new step is taken in the cause. Here, therefore, they need not have applied before the declaration was filed. They could not be aware of the objection to the writ until then. Besides, the writ can neither be waived or amended, as, in point of fact it is no writ whatever, but a mere general warrant. Their signing the bail bond was no waiver of the irregularity, as it was done out of Court, and when they offered to execute a warrant of attorney, they could not know that the writ was defective. In *Wilkes v. Lorck* (b), the Court discharged a defendant arrested by a wrong Christian name, on motion in the first instance. The sheriff being directed to take Messrs. *Llewellyn* and *Belcher*, might have arrested any persons of that name; and if the affidavit to hold to bail was couched in the same terms as the writ, no perjury could be assigned on it.

But, *per Curiam*.—The plaintiff has shewn the defendants the greatest possible indulgence. They might have applied on the first day of the Term, but they neglected to do so, and on the contrary allowed nearly the whole of it to elapse. In *Wilkes v. Lorck*, the motion was to discharge the defendant from the arrest; but here they have signed the bail bond which has been regularly executed. That circumstance alone is a sufficient waiver of the irregularity in the writ.

Rule discharged, without Costs.

(a) 1 Marsh. 403.——(b) 2 Taunt. 399.

1820.

In Re RICHARD PETER SMITH.Saturday,
Feb. 12th.

Mr. Serjt. *Lens*, on a former day in this Term, applied for a rule *nisi*, to strike the above named attorney off the rolls of this Court, on an affidavit which stated, that the Master of the *King's Bench* had reported, that he had been struck off the Rolls of that Court, for having instructed his clerk to swear that he was a lace manufacturer, for the purpose of his justifying as bail. But the Court required an affidavit to state, that the original report was in the custody of the Master of the *King's Bench*, according to the usual practice in such cases; and that the present motion was founded on a true copy of such report;—which, having been accordingly obtained,

If an attorney be struck off the rolls of the Court of *King's Bench* for misconduct, this Court will make a like order, on motion, founded on a copy of the original report of the Master of *K.B.*

Mr. Serjt. *Vaughan* now moved, that the rule might be enlarged; but having no affidavit in answer to those stated in support of the application, the Court held that they were sufficient, and therefore made the rule

Absolute.

REGULA GENERALIS.

Hilary Term, 60th Geo. III. and 1st Geo. IV.

IT IS ORDERED by the Court, that from and after the last day of this present *Hilary Term*, no motion shall be made at the Bar on the last day of any Term, touching the amendment of any Fine or Recotery, or any of the proceedings therein.

R. DALLAS.

J. A. PARK.

J. BURROUGH.

J. RICHARDSON.

END OF HILARY TERM.

CASES

ARGUED AND DETERMINED

IN THE

Courts of Common Pleas

AND

Exchequer Chamber,

IN EASTER TERM,

IN THE FIRST YEAR OF THE REIGN OF GEORGE IV.

MEMORANDA.

IN the course of the last Vacation, the Right Honorable Sir *Vicary Gibbs*, Knight, late Lord Chief Justice of this Court, died at his house in *Russell Square*.

On the first day of this Term, *John Fonblanque*, Esq. *Thomas Jervis*, Esq. and *Charles Wetherell*, Esq. whose patents of precedence had expired on the demise of his late Majesty, again took their seats within the Bar, having received fresh patents of precedence shortly after the end of the last Term; and *Robert Matthew Casberd*, Esq. on the

1820. same day, took his seat again within the Bar, as one of his Majesty's Counsel learned in the law.

On the third day of this Term, *Henry Brougham*, of *Lincoln's Inn*, Esq. having been appointed Attorney-General, and *Thomas Denman*, of *Lincoln's Inn*, Esq. having been appointed Solicitor-General, to her Majesty the Queen, they took their seats within the Bar, with the rank belonging to their respective offices.

Mr. Justice *Park* was prevented from attending the Court during the whole of this Term, from indisposition.

BERNEY v. VYNER.

A. and *B.* being in partnership as traders, and in insolvent circumstances, stopped payment, on the 15th of February, 1819, and dissolved their partnership on that day. *A.* being separately possessed of freehold and leasehold estates, conveyed the whole of them on the same day, by indentures of lease and release, to trustees in trust for sale or mortgage, for the purpose of converting such estates into money, it being convenient to *A.* to raise money at an early period. Subsequently to this conveyance, *A.* and *B.* gave a power of attorney to *C. & Co.* to recover all debts which should be due to them, together with full powers for them to act:—Held, that these circumstances did not constitute an act of bankruptcy by *A.*

THE Lord Chancellor, by interlocutory order in this cause, dated the 13th of November, 1819, directed the opinion of the Judges of this Court to be taken on the following case, which was distinguishable from that of *Berney v. Davison* (a), in the following respects only:—

After stating, that previously to February, 1819, *Boehm* was seised in fee, and possessed of and entitled to, divers freehold, copyhold, and leasehold estates in *England*;—and after setting out the indentures of lease and release, of the 13th and 15th of that month, it proceeded to state, that

(a) *Ante*, page 126.

After stating, that previously to February, 1819, *Boehm* was seised in fee, and possessed of and entitled to, divers freehold, copyhold, and leasehold estates in *England*;—and after setting out the indentures of lease and release, of the 13th and 15th of that month, it proceeded to state, that

before that time, *Boehm* and *Taylor*, being in partnership together, had become embarrassed, and were indebted to divers persons in bills of exchange, which had been accepted in the name of the partnership, and on other negotiable securities, to a very large amount, and that the partnership was also considerably indebted to several persons, on account of monies left and deposited with them at interest, and that they had contracted various other debts in the course of carrying on their business of merchants; that *Boehm* was also indebted to divers persons on his private or separate account, and that the assets or property of the house of *Boehm* and *Taylor* were greatly insufficient to discharge the debts, and meet the engagements of the partnership; that the house, about the time of the execution of the indentures, of the 13th and 15th of *February*, was insolvent, and that either previously to, or shortly afterwards, they stopped payment, and were in fact unable to pay the debts then due and owing from them; that subsequently to the execution of the indentures, *Boehm* and *Taylor* executed a deed-poll, or power of attorney, whereby they appointed *H. Fletcher*, *J. Alexander*, and *H. Porcher*, as their attornies, to recover and receive all debts and sums of money for goods, chattels, and effects, which should be due to them, or either of them, upon any securities or otherwise, and they thereby also gave *Fletcher*, *Alexander*, and *Porcher*, all such powers and authorities as are usually found in instruments of the like description;—that *Boehm* and *Taylor* stopped payment about the 15th of *February*, 1819, and also dissolved their copartnership on that day; and that *Boehm*, as an individual, also stopped payment on the 5th of *March* following.

The question for the opinion of the Court was, “Whether, by reason of all or any of the matters and things before stated, *Boehm* had committed an act of bankruptcy?”

1826.

BERNARD
V. VYNER.

1829.

BERNEY
v.
VINEY.

And if so, what such act of bankruptcy was? and when the same was so committed?"

The case came on for argument in the course of the last Term, when Mr. Serjeant *Lens*, for the plaintiff, submitted, that although no mention was made of *Boehm's* personal property, or that the plaintiff and *Thornton* were not his creditors, or his motive for executing the deeds of conveyance, and although no notice was taken of the abstract of the unexecuted deed furnished to the purchasers, and it was further stated, that *Boehm* and *Taylor* were insolvent at the time of the execution of the indentures of lease and release, and stopped payment about that time, and were then unable to pay their debts,—still, it did not alter the case, as there was nothing to shew a fraudulent transaction, or an intention by *Boehm* to defraud his creditors, or that his property should be distributed in contravention of the bankrupt laws, and more particularly so, as every trader, before an act of bankruptcy, may pay his most urgent creditors, and dispose of part of his property for that purpose. Besides, all the creditors were benefited by the conveyance, which did not even bear the semblance of a fraudulent preference.

Mr. Serjt. *Bosanquet*, *contra*, insisted, that this case was mainly distinguishable from that of *Berney v. Davison*, as here, there was a conveyance of *all Boehm's* estates in general terms, whilst there it was stated, that he was possessed of personal property to the amount of 27,000*l.* besides real property. Here too, it does not appear that *Boehm* was possessed of any personal property, independently of his partnership assets, which were insufficient to discharge the partnership debts. From the statement in this case, therefore, the whole of his property might be placed out of his controul, which would clearly amount to an act of bankruptcy. *De non apparentibus, et non existentibus,—eadem est ratio.* In the former case too, it was stated, that *Boehm*

was induced to convert his estates into money, by reason of his advanced age, and to obviate difficulties which might have arisen, if he had died without executing any conveyance of such estates. That, therefore, negatived the intention of fraud, and assigned an innocent motive for his so doing. Another strong circumstance here is, that the house of *Boehm* and *Taylor* were insolvent, and stopped payment at the time of the execution of the deed, and dissolved their partnership on that day, but that *Boehm* did not stop payment until the 5th of *March* following, while in *Berney v. Davison* it was stated, that he paid, either out of his own separate funds, or assets of the partnership, till that day. Although no fraudulent intent be expressly found in this case, still the conveyance of the property by the deed in question, tended to prejudice and delay *Boehm's* general creditors, who might otherwise have proceeded against his real estates by *elegit*, and against his personal property under a writ of *fiери facias*. But all his property was by the deed to be reduced into money, which was to be placed in the hands of the trustees, so that a judgment-creditor could not touch it during the time it remained there. This, therefore, falls within the spirit of the statute 1 Jac. 1. c. 15. s. 2, as the conveyance operated to delay the creditors at large, and defeat the judgment-creditors from the recovery of their debts. From the terms of the deed, the whole of *Boehm's* property was put entirely out of his disposition, and the trustees having converted it into money, were bound to provide for the future creditors, who might advance money or bills before the old or general creditors. So, those creditors would be equally delayed, and unable to enter up execution on any judgments they might have obtained. As to the produce of the estates the trustees might have vested in Government securities; although the terms of the trusts contained in the deed might be beneficial to *Boehm's* creditors, still, if any of them are delayed from receiving their debts, it falls within the statute of *James*; and from the facts as stated in

1820.

BERNEY

v.
TYNE.

1820.

BERNEY

v.

VYNER.

this case, it is quite clear that *Boehm* has committed an act of bankruptcy.

Mr. Serjt. *Lens*, in reply.—As the case now stands, it embraces the single question, Whether the deed of the 19th and 15th of *February* be fraudulent on the face of it or not? If any fraudulent intent could be inferred or imputed from the other facts stated in it, it would have been a question for a Jury to determine. *Boehm's* motives for conveying his property, were equally innocent in this case, as in *Berney v. Davison*, viz. for the general benefit of his creditors, as he was unable to pay his debts—and as it would be convenient for him to raise money at an early period. This was for the general benefit of his simple contract as well as all his other creditors. It cannot be inferred, that because a trader conveys his estate to trustees, it must necessarily amount to an act of bankruptcy, particularly when his motive for so doing is founded on a fair and equitable consideration; and here, the sole object was, to convert *Boehm's* real property into money, for the purpose of expediting the payment of debts due from him to his creditors at large. In point of fact, therefore, this case is not distinguishable from that of *Berney v. Davison*, as no fraudulent intention appears on the face of it, from the facts as stated therein.

Lord Chief Justice *DALLAS*.—It appears to me, at the present moment, that the legal effect of the deed was to provide a speedier payment to *Boehm's* creditors at large, by converting his real into personal property. However, the Court will certify to the Lord Chancellor.

The following certificate was afterwards sent :—

“ This case has been argued before us by counsel. We have considered it, and are of opinion that *Boehm* hath

not, by reason of all or any of the matters and things stated in the case, committed any act of bankruptcy.

" R. DALLAS.

" J. A. PARK.

" J. BURROUGH.

" J. RICHARDSON."

1820.

REALLY

VERY

JAMES DRAGE MEREST, and EUNICE ANNA his
Wife v. JAMES.

A CASE, of which the following is the substance, was sent, by the direction of the Master of the Rolls, for the opinion of the Judges of this Court :—

Samuel Pearson, the grandfather of the plaintiff *Eunice Anna Merest*, being seised of freehold and copyhold estates, in the county of *Cumberland*, on the 24th of *March*, 1784, devised them to his son *John*, when he should attain the age of twenty-five years, for life only, without impeachment of waste, and after his decease, to the issue of his body, and their heirs; and in default of such issue, to his son *Samuel*, for life, his issue, and their heirs. There were similar limitations to his son *Henry*, and daughter *Elizabeth*. The testator, *Samuel Pearson*, died in *May*, 1784, without having revoked his will, leaving *John Pearson*, then an infant, his eldest son and heir at law, who attained the age of twenty-five in *May*, 1790, and died in *February*, 1807, leaving *Eliza Pearson*, his widow, and the plaintiff *Eunice Anna Merest*, his only child and heiress at law, having previously by will, dated the 23d of *March*, 1804, devised to two trustees, and their heirs, all his messuages, lands, tenements,

Devise of all the devisors messuages, lands, and tenements, freehold and copyhold, to trustees, "to the use of his daughter for life, and after her decease, to the use of her issue; and in default of issue, or in case none of such issue live to attain the age of twenty-one years," then over :—Held, that the daughter took the beneficial interest in the premises, for her life only.

1698.
Manner
o.
JAMES.

and hereditaments, situate at *Hawkesdale*, in *Hawkinghall*, *Stetton*, and *Wragmire*, in the county of *Cumberland*, to the following uses; (that is to say), as to the dwelling-house then in his own possession, situate at *Hawkesdale*, to the use of his wife, during the time she continued his widow, and immediately after her marriage, to the use of his daughter *Eunice Anna*, for life; and as to all other his lands and hereditaments, in *Cumberland* or elsewhere, upon trust, that the trustees should, out of the rents and profits of all or any of the said lands and hereditaments, pay yearly to his wife *Eliza*, the clear sum of £100, without any deduction or abatement whatsoever.

And as to, for, and concerning all the messuages, lands, tenements, and hereditaments therein before given or limited, upon the trusts aforesaid, to the use of his daughter *Eunice Anna Pearson*, for and during her natural life, and from and immediately after her decease, then to the use of the issue of her body lawfully begotten; and in default of issue, or in case none of such issue lived to attain the age of twenty-one years, then he gave and devised all the lands at *Hawkesdale* and *Hawkinghall*, to his brother *Samuel*, for and during his natural life, and from and immediately after his decease, then to the use of the issue of his body; and in default of issue, or in case none of such issue lived to attain the age of twenty-one years, then he gave and devised the same to his brother *Henry*, for and during the term of his natural life, and from and immediately after his decease, then to the issue of his body lawfully begotten; and in default of issue, then to his sister *Elizabeth*, her heirs and assigns for ever. Also, after the death of his daughter *Eunice Anna* without issue, (or, if issue, they should not live to attain the age of twenty-one years as aforesaid), then he gave and devised to his brother *Henry*, his heirs and assigns, all his copyhold messuages and tenements at *Wragmire*. Also, he gave and devised, after the death of his daughter *Eunice Anna* with-

and assigns, all his messuages and tenements situate at *Stanton*.

1806.

MURRAY

v.
JAMES.

Eliza, the widow of the testator *John Pearson*, is still living, and unmarried. His brother *Samuel* died in *March*, 1814, leaving issue two daughters, who are both living; and his elder brother, *Henry*, is still living, and hath issue.

ONE CHARGE.

The several estates devised by his will, are the same as were devised by the will of *Samuel Pearson*, his father, and are partly freehold and partly copyhold. In the month of *April*, 1814, the plaintiffs intermarried, and have had issue two sons and three daughters, neither of whom are alive; and, in *October*, 1818, they entered into a written contract with the defendant for the sale to him of all the freehold and copyhold lands of the plaintiffs, situate at *Widgmore*, devised by the aforesaid wills. The defendant objecting to the plaintiffs' title to the premises so contracted to be purchased by him, they filed a bill in *Chancery* against him, for the purpose of compelling a specific performance of the contract.

THE CHARGE.

The question for the opinion of the Court was, "What estate did the plaintiff *Elizice Anna*, the wife of the plaintiff *James Drage Murray*, take in the freehold and copyhold tenements contracted to be purchased by the defendant, under the wills of *Samuel Pearson*, her grandfather, and *John Pearson*, John's father, in the pleadings respectively framed?"

THE CASE.

This case came on for argument, in the course of the last *Term*.

Mr. Serjeant Lush, for the plaintiffs, observed, that the only question was, what estate *Elizice Anna*, the wife of the plaintiff *J. D. Murray*, took under the will of her father, *John*

1620.
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 MERRITT  
 v.  
 JAMES.

*Pearson*, in the tenements devised by that will—as nothing whatever turned on the will of her grandfather, *Samuel*. By the particular expressions used in the former, she took an estate tail. If the devise over to the testator's brother, had immediately followed the words "in default of issue," there could have been no doubt whatever but that she would have so taken; and notwithstanding the addition of the immediate subsequent words, "or in case none of such issue live to attain the age of twenty-one years," the only mode by which effect can be given to the apparent intention of the testator, is to construe the devise to *Eunice* to amount to an estate tail. This is clear from the nature of the words themselves. It must be admitted, that, in the first instance, he contemplated giving his daughter an estate for life only, but his further intention was to provide for her issue, as long as there should be issue proceeding from her, and not to give the estate over, until such issue should be totally extinct. If a life estate only be given, that intention will be defeated, and the effect will be to give her an estate for life, and her issue a like estate; nothing being devised, from which any thing beyond such an estate can be inferred. That would be attended with this consequence, that taking in the remaining words, "or in case none of such issue live to attain twenty-one," if the immediate issue of *Eunice* should marry and have issue, and die before arriving at that age (which is not a very remote contingency), such issue must be excluded, as there is nothing to carry the estate beyond the first taker. If the issue took as purchasers, they could only take an estate for life, and if even it should be extended to the issue of such further issue, they could only take a like estate—as life estates would be created, that would only carry it for one life, and the estate would go over to a stranger, while the immediate children of the testator's daughter would be wholly unprovided for. The only mode to give effect to the intent of the testator, that the estate should not go over to the more distant de-

scendants, is for his daughter *Eunice* to take an estate tail; for, from the case of *Roe, d. Dodson v. Grew* (a), to *Doe, d. Cock v. Cooper* (b), it has been uniformly held, that where there are two apparent intentions in a will, viz. a general and a particular intent, and both cannot be carried into effect, the latter must give way to such general intent, which in this instance was to give an estate tail, rather than for life. If these latter words, "as to the issue not attaining the age of twenty-one," be deemed inconsistent with an estate tail, another difficulty intervenes, viz. that although the testator's particular intention might be carried into effect, by giving his daughter an estate for life only, still, that his main and general intent could only be observed by providing for her issue, and thereby creating an estate tail. Even if such issue should survive the age of twenty-one, there are no words of limitation, or particular or general expressions, from which it can be inferred that they took more than an estate for life, unless the general construction be resorted to, that the testator did not intend the estate to go over,—which will introduce the same principle, that although there be nothing from which it can be collected that this construction shall be resorted to, to render it effectual, the words "in default of issue," do not stand alone, but must be taken with those which tend to bring them to a narrower construction, and which explains the principle, that less important words must be sacrificed, and unless that doctrine be deemed applicable to this case, the main object of the testator will be defeated. There is no case precisely applicable to the present, but in *King v. Melling* (c), it was held, that a devise to A. for life, and after his death to his issue, and in default of issue, to B. and his heirs for ever, created an estate tail in A. But the case that bears the nearest resemblance to this, is

1829:

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 MERRITT  
 v.  
 JAMES

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(a) 2 Wils. 322. S. C. *Wilmot's Cases and Opinions*, 272.——  
 (b) 1 East, 329.——(c) 1 Vent. 214. 225. S. C. 2 Lev. 58.

1826.

Monroe  
v.  
James.

That of *Doe, d. Davy v. Burnall (a)*. Still, however, it is very distinguishable, for there the inheritance was devised, and the children taking by purchase would take an estate in fee, while here, there is no term whatever which will carry the inheritance, nor words of limitation, nor general expressions tantamount to it. There too, the deviser contemplated, that the children would only take as purchasers, and mentioned them *eo nomine* as children; for he devised to his niece, and the issue of her body, as tenants in common (if more than one), and then devised over, in default of such issue, thereby meaning the children before described. Here, however, the devise over is general, in default of issue. There, too, the children, and all their descendants were provided for, as the estate could not have gone over to strangers, until they had all died without leaving lawful issue of their bodies, for the devise over was only to operate in default of such issue, or being such, if they should all die under the age of twenty-one, without leaving issue. That case, therefore, was different from the devise of an estate for life only, as there the limitation over was to operate only on death under twenty-one, without leaving issue; and therefore the issue of such issue could not be excluded, while here, no provision is made for such issue, in the event of the death of the immediate issue under twenty-one years. The devisee, therefore, in that case, had only an estate for life, it being unnecessary to give her a larger interest, as by the express provisions of the limitation, her issue took estates in fee. The fair inference to be drawn in this case is, that the testator intended to provide for his daughter and her issue, so as to continue the estate in the right line, before it should go over to the more remote descendants; and although, in terms, he has only given a life estate to his daughter, the first taker, and nothing more than a life

estate to her issue, and although he has made no provision for an event which might happen, namely, that she might have issue who might die before twenty-one, still it was his manifest intention that an estate tail should be given to his daughter *Eunice*, by which, according to the doctrine laid down in *Roe, d. Dodson v. Grew*, and the later cases, the minor intention would be sacrificed to the greater.

1830.  
Mansfield  
v.  
James.

Mr. Serjt. *Hullock, contrd.*—By the terms of the will of *John Pearson*, and according to legal principles, his daughter *Eunice* took an estate for life, with a contingent remainder to her issue in fee, as joint tenants, determinable by executors devise over, in case none of such issue should attain the age of twenty-one. It has been said, however, that there are no words of limitation to give a larger estate to the children of *Eunice* than a life interest. But that construction cannot be put upon the will, without rejecting the words, “in case none of such issue live to attain twenty-one;” for if the object of the testator was to give them a life interest only, the will would be nugatory; but his primary intent was to give them an absolute estate, in case they attained the age of twenty-one, and that if they died before that time, then over to his brothers and sister. Admitting that there are no words of inheritance, still, *ex necessitate rei*, the testator intended that the children of his daughter should take an estate in fee. In *Fragnerton, d. Bramstone v. Holyday* (a), it was held, that circumstances might support the interpretation of a devise to be in fee, which on the face of it was only for life. There, there was a devise to *J. H.*, and if he should happen to die in his minority, then over to the deviser’s three daughters; and Lord *Mansfield* observed (b), that those words, “if he should die in his minority,” shewed an intention

(a) 3 Burr. 1612. — (b) 12. 1623.



1820.

MERRIST

v.

JAMES.

to give the fee, for if the devisee lived to twenty-one, he might then dispose of it himself, but that if he died before, he could not, and then that the devisor had disposed of it." The same inference is to be drawn in this case, as the testator contemplated the death of his daughter's issue under twenty-one. And his Lordship further said (a), that "the argument holds equally from a limitation over, if the first taker dies in his minority,—to infer that he was intended to have the absolute property, if he attained his majority." The same doctrine was adopted by Lord *Ellenborough*, in *Doe, d. Wright v. Cundall* (b), where, having referred to the case of *Tomkins v. Tomkins* (c), his Lordship concluded by saying, that "there are other authorities which might be cited, that a giving over on a dying before twenty-one, shews an intention, that if the party attain twenty-one, he should have a fee absolute." Admitting, that there are no words of limitation, as to what estate the issue of *Eunice* was to take under the will, it is quite clear that the primary object of the testator was, that his daughter should not be empowered to defeat the estate of her issue, by disposing of it in her lifetime, which she might do, if she can be deemed to take an estate tail—and there is no other mode of preserving it, and protecting her issue, than by giving her an estate for life only. The class of cases from *Roe, d. Dodson v. Grew*, to *Doe, d. Cock v. Cooper*, merely establish, that where there is a general and particular intention apparent on a will, the latter must be sacrificed to give effect to the larger and more general intent. In the latter case, the Court could not carry into effect the particular intent of the testator, by giving an estate for life, but they were under the necessity of giving the first taker an estate tail, in order to effectuate the general intent, and leave the rule of law untouched, that cross remainders can-

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(a) 3 Burr. 1624.—(b) 9 East, 403, 4.—(c) Cited by Lord Mansfield, in *Goodtitle, d. Hayward v. Whitby*, 1 Burr. 234.

not be implied between more than two, and Lord Kenyon there founded his opinion distinctly and exclusively on an inability of effecting the devisor's particular intention, without violating his general intent, which was, that all the devisee's issue should inherit the entire estate before it went over. *Roe, d. Deddon v. Grew* contained the same principles as those on which the case of *Doe, d. Cock v. Cooper* was decided. But both these cases turned on grounds wholly different from the present, as here, the children of Eunice would be entitled as joint tenants, and not as tenants in common. The same distinction was drawn in *Doe, d. Candler v. Smith (a)*, which was confirmed by the decision of the Court in *Doe, d. Cock v. Cooper*, where the first-taker was held to take an estate tail, for the purpose of carrying into effect the general intention of the testator. But here, the intent of the devisor was, that the estate should go to the children of his daughter, and that, if they attained the age of twenty-one, they should take it in fee. His particular intent, therefore, may be carried into effect consistently with his general one, namely, that of carrying the estate over to her issue, which will be entirely defeated by giving her an estate tail. The case of *Doe, d. Davy v. Burnnull* is expressly in point, but is not so strong as the present, as there the issue of the devisee were to take as tenants in common. Here, the fee might arise by implication, from the circumstance that the estate of the issue was not to determine on their deaths, but only in the event of their deaths under twenty-one, and that case is an authority for such a construction to be put upon the present will—and the reasoning of Lord Kenyon there, is particularly applicable. It is true that a contingency might happen, by which the issue of Eunice might be deprived of the estate; for if she should have a child who had issue, and such child should

1820.

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MEREST
v.
JAMES.

(a) 7 Term Rep. 551.

1890.

MURPHY

v.
JAMES.

die under twenty-one, the estate would go over, and such issue would be deprived of it. It is probable the testator did not contemplate that event, but his general intent was, that, whether he had grand-children or not, the estate should not be disposed of by his daughter; and if she take an estate tail, she will not only have an absolute disposal of the estate, but will cut off the entail from her future issue (should she have any), and deprive the collateral relatives of the deceased of any enjoyment they might derive under the will. The same construction must, therefore, be put on this will, as was done in the case of *Doe, d. Davy v. Burnsall*, namely, that it was a contingency with a double aspect, and that if the deviser's daughter had any children, the estate would be limited to them in fee, and that if she had none, or any who died under twenty-one, then it was to go over. In *Burnsall v. Davy* (a), this Court put the same construction on the words of the will in the case of *Doe, d. Davy v. Burnsall*, as the Court of King's Bench had previously done; and in *Crump, d. Woolley v. Norwood* (b), Lord Chief Justice Gibbs, in delivering the judgment of the Court, adopted the construction put on it by Lord Kenyon, in *Doe, d. Davy v. Burnsall*. In *Toovey v. Basset* (c), the devise was in terms similar to the present, and is confirmatory of the principle laid down in *Crump, d. Woolley v. Norwood*. On the whole, therefore, it is quite clear, that *Eunice* took only an estate for life, with a contingent remainder in fee to such child or children as she might have, determinable by an executory devise over in case of the death of such child or children under twenty-one; and from all the decisions in the cases of *Frognorton, d. Bramston v. Holyday*, and *Doe, d. Davy v. Burnsall*, to *Doe, d. Wright v. Cuddall*, it is quite clear they would take an estate in fee. The clear intent of the testator, therefore, was, that his daughter

(a) 1 Bos. & Pul. 215. — (b) 2 Marsh. 161. S. C. 7 Term. 322. —

(c) 10 East, 460.

should have no control over the estate, or be empowered to defeat the limitations contained in his will, but that the estate should be kept in his own family, and go to his immediate descendants; in case his daughter had issue, who should live to attain the age of twenty-one; if not, that it should go over to his brothers and sister, the collateral branches of his family.

1822.

MURDER

P.
JAMES.

Mrs. Serjt. *Lens*, in reply.—Although the case of *Doe, d. Darcy v. Burnzall* has been particularly relied on for the defendant, as bearing the nearest resemblance to the present both in point of principle and application, still, it is so far distinguishable, as to leave that decision wholly untouched, by giving to the deviser's daughter *Eunice* an estate tail. There, all the deviser's estates were devised, and the inheritance was conveyed; and the ground of the decision was, that it was a contingency with a double aspect. All the cases analogous to the present; and the general doctrine contained in them as applicable to this question, are collected in *Cruise's Digest* (A). It has been insisted, however, that it could not be the intention of the testator to give an estate tail to *Eunice*, the first taker, as she might thereby exclude her children from enjoying the inheritance. That, however, is not to be considered, for the law does not look to the destruction, but the continuance of estates. What, therefore, a tenant in tail may be empowered to do, is inapplicable to the present question; for it is not to be inferred, that if an estate tail be given, it is immediately to be disposed of by the first taker, but it may continue for the use of the issue in succession, which would sufficiently comply with the intent of the testator. The case of *Frogmorton, & Bramstone v. Halliday* has been referred to, to shew that the issue of

(a) Vol. vi. 2d edit. pages 305. 377.

1828.
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 MERRETT  
 v.  
 JAMES.

*Eunice* would take a fee by implication, but that cannot be laid down as a general principle. Still, it is wholly distinguishable from the present, as the estate was there given to the son by name, and if he should die under twenty-one, then over; and the Court proceeded on the ground, that it could not go over, unless the first taker should die under that age:—If he attained it, the estate was never to go over, and therefore he took a fee by implication. But here, the provision is not confined to the first taker, *Eunice*, but extended to her issue, and even embraces all the issue of such issue. No fee, therefore, can be raised by implication in the children of the devisee, as such implication is incidental and uncertain, viz. at any period when the issue should happen to die under twenty-one. The case of *Doe, d. Candler v. Smith*, merely substantiates the general principle, that when the leading object of a testator is to preserve an estate in his own family, the Court will give the words effecting it, their full import, and sacrifice those which appear to be inconsistent with such general intent. That principle is applicable to the present, as the main and general object of the testator can only be fulfilled, by giving an estate tail to his daughter *Eunice*, the first taker, he not having foreseen what has in fact happened. The plaintiffs, therefore, are entitled to dispose of the lands in question, notwithstanding the inconvenience that may follow from there being no issue of the marriage, who have attained an age to join in the conveyance.

*Cur. adv. vult.*

The following certificate was afterwards sent to the Master of the Rolls:—

“ This case has been argued before us by counsel. We have considered it, and are of opinion, that by the will of *John Pearson*, the father of the plaintiff *Eunice Anna*, the legal estate in the freehold and copyhold tenements, con-

tracted to be purchased by the defendant, is vested in the devisees in trust, therein named;—and that subject to the trusts thereby created, the said *Eunice Anna* took the beneficial interest in the said freehold and copyhold premises, for her life only, under the will of the said *John Pearson*, her father;—and that she took no estate or interest therein under the will of *Samuel Pearson*, her grand-father.

1820.

MEREST

v.  
JAMES.

“ R. DALLAS.

“ J. A. PARK.

“ J. BURROUGH.

“ J. RICHARDSON.”

VENABLES v. WILKS.

Wednesday,  
April 19.

MR. Serjt. *Taddy* moved for a rule *nisi*, that the sheriff in this cause might be indemnified, in paying over a sum of money to the plaintiff, on the grounds that the defendant had become a bankrupt nearly two years since; and that his assignees had refused to indemnify the sheriff, or acquiesce in his paying over to the plaintiff the sum received by him in this action. He observed, that five successive applications had been made to the Court by the sheriff, in the course of the last five Terms, to enlarge his return to the writ of *venditioni exponas*, under which the defendant's property had been sold, and that it was altogether a useless and unnecessary expence.

A sheriff may apply to the Court for a rule to enlarge his return to a *venditioni exponas*, from Term to Term, if the defendant become bankrupt, unless he be indemnified by the assignees in paying over the money levied under it, or the rule for such enlargement be duly discharged.

But, Mr. Justice BURROUGH, (the only Judge in Court) observed, that the usual course, in cases of this description, was for the sheriff to move the Court for an enlargement of his return; that he was not compelled to make a return, till

1820.  
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 VENABLES
 v.
 WILKS.

the rule for such enlargement be discharged; and that the enlargement was always allowed, as a matter of course.

The learned Serjeant took nothing by his motion.

Thursday,
 April 20.

BURNELL v. MINOT.

The plaintiff and defendant entered into a joint and written contract with the owner of a vessel, to supply her with colonial produce at Jamaica by a given time. The contract not being complied with, the owner made a demand on the plaintiff alone, who agreed to refer the amount of the damage sustained by such owner to an arbitrator, without the knowledge or consent of the defendant. The arbitrator having awarded a certain sum to be due to the owner, the plaintiff paid the amount, and brought an action for money paid, against the defendant for a moiety thereof:—Held, that he was entitled to recover.

THIS was an action of *assumpsit* for money paid. At the trial of the cause before Mr. Justice *Burrough*, at *Guildhall*, at the adjourned Sittings after the last Term, it appeared that the plaintiff and defendant, on the 18th of *April*, 1817, entered into the following joint undertaking, with a person by the name of *Faith*:—

“ To Mr. *George Faith*.

“ Sir,

“ In consideration of your allowing your ship, the *Mary Ann*, to receive in the *West India Docks* such goods as may be sent alongside, and proceed with the same to *Kingston, Jamaica*, to the address of Messrs. *William Harris and Co.* we hereby engage to give the vessel, after she has discharged the whole of her outward cargo, four hundred and fifty casks of colonial produce, at the current rates of freight given to other ships then loading at *Kingston*; and we do further engage, that the same shall be ready for the vessel, so that she shall have sufficient time to depart from *Kingston* for *London*, prior to the 1st *August*, 1817; and should we not be able to obtain the four hundred and fifty casks of produce for the vessel in due time, we do hereby engage to pay freight on any deficiency of that quantity.”

Signed by the plaintiff and defendant.

The plaintiff stipulated with the defendant to perform the agreement, and was the only acting person under it. However, he did not procure the produce within the time stipulated by the agreement, and the ship in consequence brought home another cargo, which was loaded after the 1st of *August*, and which was not consigned either to the plaintiff or defendant. Some time afterwards, *Faith* applied to the plaintiff to make compensation for the delay, and not shipping the produce, as stipulated by the agreement—and threatened him with an action in case of refusal. The plaintiff not choosing to defend an action, he and Mr. *Faith*, without the privity or concurrence of the defendant, entered into bonds of submission for an arbitrator to determine what payment should be made to *Faith* for the breach of the agreement. The arbitrator awarded £1051. 7s. to be due, which the plaintiff accordingly paid, and brought the present action against the defendant to recover £525. 17s. being a moiety of that sum. The learned Judge observed to the Jury, that the award was entirely out of the question, except as to the ascertaining the damages due to *Faith*, and that the plaintiff's demand was wholly distinguishable from an ordinary partnership claim; and they accordingly found a verdict for the plaintiff for the amount of his demand.

1820.

BURNELL
v.
MINOT.

Mr. Serjt. *Vaughan* now moved for a rule *nisi*, that this verdict might be set aside, and a new trial granted, on the ground that the present action was not maintainable, as this was a joint transaction, in which the plaintiff and defendant were partners, and that the matters between them were only cognizable in a Court of Equity;—that the plaintiff's being merely awarded to pay a sum of money, afforded no evidence that the same result would have taken place if the question between him and *Faith* had been tried before a Jury;—that at all events, the sum paid by the plaintiff to *Faith* was not conclusive, so as to bind the defendant, inasmuch as he was not bound by the award, and that the da-

1820.

 BURNELL
 v.
 MINOT.

images were unliquidated, as it was merely an unascertained demand or balance, for which, as between partners, proceedings ought to have been had recourse to in Equity, and not at Law.

Lord Chief Justice DALLAS.—It is at all times extremely dangerous to lay down a more extensive rule than occasion requires. Confining myself, therefore, to this particular case, I think that my Brother *Vaughan* is not entitled to the rule he now applies for. What are the facts? The plaintiff and defendant entered into a joint contract with a third person, to supply a vessel of his with colonial produce at *Jamaica*, so that she might be dispatched with the same for this country on a given day. In case therefore, such produce were not supplied, or put on board, as stipulated, the owner of the ship had a claim on both the plaintiff and defendant. The contract between them was joint, and they were consequently jointly liable. The owner of the vessel made a demand on the plaintiff alone, as one of two joint contractors, who, in consequence of such demand, declined defending an action, but referred the amount due to the owner to the decision of an arbitrator. This was the most beneficial course he could possibly adopt, both for himself and the defendant. Under that award, he paid the whole of the sum stated to be due to the owner by the arbitrator, a moiety of which he now seeks to recover from the defendant by the present action. It was stated to the Jury by my Brother *Burrough*, at the trial, that the award was out of the question, except as to the apportionment of damages. It has been said, that this being an action for money paid, it is not maintainable by one partner against another, on a joint contract; but the only questions are, Whether there has been a breach of that contract? and whether the damages found by the arbitrator were commensurate therewith. Both these points the defendant might have taken at the trial, and he might also have

disputed the contract, or denied his liability. But a breach of the contract has been most clearly established; and as to what proportion the defendant was liable to pay, he might have litigated at the trial; but he then made no objections of this nature. Confining myself strictly to the facts of this case, I think the plaintiff is entitled to recover.

1820.
BURNELL
v.
MINER.

Mr. Justice BURROUGH.—I was perfectly satisfied with the finding of the Jury, and now see no reason to alter my opinion.

Mr. Justice RICHARDSON.—I am of opinion that the present action is maintainable. The only question is, whether this be money paid by the plaintiff to the defendant's use? I think the former paid the sum awarded, for himself, conjointly with the latter. It has been said, that this may be considered in the nature of unliquidated damages; but the facts of the case do not warrant such a conclusion.

Rule refused.

WALKER v. MILLS.

Thursday,
April 20.

THIS was an action of debt, and brought to recover from the defendant two penalties, under the 5 Anne, c. 14. s. 4, and 9 Anne, c. 25. s. 2, the one for using a snare for the destruction of game, he not being qualified so to do, the other for

A servant of a qualified person assisted his master in setting a trap on his land for taking rabbits and vermin, and he ordered such servant, if a hare should be caught, to bring it to him. A hare being afterwards caught in the trap, in the absence of the master, it was accordingly killed, and carried to him by the servant:—Held, that he was not liable to the penalties for using snares for the destruction of game, or having it in his possession, so as to constitute an exposure to sale under the statute 9 Anne, c. 25. s. 2.

1890.

WALKER
v.
MILLS.

exposing to sale, a hare. At the trial of the cause before Mr. Baron Garrow, at the last Assizes for Sussex, it appeared that the plaintiff was a gentleman of large landed property in that county, and that his gamekeeper, at five o'clock in the morning of *Sunday*, the 5th of *August* last, while watching for poachers on his master's grounds, heard the cry of a hare from a hedge adjoining;—that he afterwards saw the defendant, who was a cottager, and watched him;—that he saw him take up a hare, and fold something up and put it in his pocket, on which the gamekeeper and another person, went to him, when he said, that if he took hares by his master's direction, it was nothing to them. He then shewed them the hare, which he had killed, and was carrying away. The defendant's master, who was duly qualified to kill game, proved that he had traps set in different parts of his estate, as he was annoyed by rabbits and vermin, and that the trap in which the hare in question was caught, was set by his order, on his own land, and in his presence, on the preceding *Thursday*, and that he had ordered the defendant, if any hares were caught, to bring them to him, and that he had accordingly brought a hare to him, about eight o'clock on the *Sunday* morning on which the above transaction took place. Under these circumstances, the learned Baron was of opinion, that as the trap was set by the defendant, by the order and assistance of his master, he would not be liable to the first penalty; and as he carried the hare to his master shortly after it was caught, that it was in fact a possession of the master, and not of the defendant as his servant. The Jury accordingly found a verdict for the defendant.

Mr. Serjt. *D'Oyley* now moved for a rule *nisi*, that this verdict might be set aside, and a new trial granted, on the ground of a mis-direction by the learned Judge. He contended, that the defendant was liable to both the penalties; first, for using a snare; and secondly, for exposing a hare to

sale, he not being qualified to kill game. The latter penalty was clearly incurred within the words of the statute 9 Anne, c. 5. s. 2 (a). In *Molton v. Cheesley* (b), it was proved, that a pheasant had been killed *by accident*, by the defendant's dog; but as the defendant had afterwards carried it away, and was not qualified, he was held liable to the penalty. The rights of qualified persons cannot be extended to the protection of those unqualified, unless the former are actually present at the time the game is taken or pursued, as in coursing or hunting. A qualified person can in no instance send out one unqualified to kill game, and order him afterwards to bring it to him. If the defendant's master had ordered him to kill a hare with his dogs, instead of his traps, the defendant would clearly have been liable. But, on the other hand, if his master had placed the trap in question, and taken the defendant with him as his servant to examine what was in it, the latter would have been protected. But the trap was set three days before, and his master's house was more than two miles distant from it, and he was not present at the time the hare was taken by the defendant, and found in his possession.

Lord Chief Justice DALLAS.—Cases of this description generally run into very nice distinctions—and if I entertained any doubt in the present instance, I should wish to look into previous decisions; but I entertain no doubt whatever, and I must say, that I think this action was most improperly brought. The facts of the case are these:—The defendant is a servant of a person duly qualified to kill game,

1820.
WALKER
v.
MILLS.

(a) By which it is enacted, that if any hare, pheasant, partridge, &c. shall be found in the shop, house, or possession of any person not qualified in his own right to kill game, or being entitled thereto, under some person so qualified, the same shall be adjudged to be an exposing to sale within the meaning of that statute.

(b) 1 Esp. Rep. 123.

1820.

WALKER
v.
MILLS.

who was called as a witness at the trial, and who said that the land on which the trap in question was set, was his property; that he had been annoyed by hares, rabbits, and vermin, and that he had accordingly ordered the trap to be set by the defendant, and had even assisted him in placing it, in order to destroy them. It is quite clear, that the master, being qualified, had a right to set the trap; and I even think that his servant, if ordered, had a right to do so during his absence. But in this case it was proved, that the master was present at the time the trap was set, and gave directions to the defendant, his servant, to bring him any hares that might be caught therein. The trap, therefore, though set by the servant, may be considered as set by the hands of the master—and consequently, that the hare in question was caught in a trap which was placed by the master on his own land. As to the possession of the hare by the defendant, as soon as it was caught, he took it to his master, when it must be considered as in his possession, as the placing the trap in which it was taken, was not only done by his authority, but was in fact his own act.

Mr. Justice BURROUGH.—Actions of this description are generally productive of great mischief. Here, the setting the trap was the act of the defendant's master, and the possession of the hare was in him, as his servant took it to him, according to his order, shortly after it was caught.

Mr. Justice RICHARDSON.—In this action, two penalties were sought to be recovered from the defendant, the one for setting a snare, the other for exposing a hare to sale. But the snare was in fact set by the master, by whose order the hare was caught. When it was caught, it did not remain in the possession of the defendant, but he took it to his master, according to directions given him by the latter so to do. This case bears a strong analogy to that of *Warne-*

ford v. Kendall (a), where it was held, that the possession of game by a servant employed to detect poachers, who took it up after it had been killed by strangers on the manor, in order to carry it to the lord, was not a possession within the penalty of the Game Laws.

1820.

WALKER
v.
MILLS.

Rule refused (b).

(a) 10 *East*, 19.

(b) See also *Sparrier v. Vale*, 10 *East*, 413, where the Court held, that it might be presumed, that if a gamekeeper kill game, he does so for the use of his lord.

Ex parte JONES.

Tuesday,
April 25.

MR. Serjt. *Onslow*, on the first day of this Term, had obtained a rule nisi, that the clerk of the warrants might enter and file the certificates of the applicant, from the year 1815 to 1819, on an affidavit which stated, that he had long previously been admitted an attorney of this Court, and that his certificate, for the last four years, had, by mistake, been filed in the Court of *King's Bench*; that from the time of his admission to 1815, his certificates had been regularly filed in this Court, when he changed his agent, who had inadvertently taken out his certificates in the Court of *King's Bench*, where he had not been admitted.

If the certificate of an attorney of this Court be, through mistake of his agent, filed in *K. B.* where he was not admitted, for four successive years, such certificate may be entered and filed here, on a notice of the fact being given to the Stamp Office.

Mr. Justice BURROUGH (the only Judge in Court) directed a notice to be given to the Stamp Office, to ascertain whether the duties had been regularly paid during these four years; which having been accordingly done, and no cause shewn, the rule was this day made

Absolute.

1820.

Wednesday,
April 26.HINDE, Demandant; HINDE, Tenant; BLAND,
Vouchee.

A warrant of attorney in a recovery was taken and acknowledged before two Commissioners, at Cape Town. The usual affidavit of caption and acknowledgment was sworn by one of them, before the Deputy Fiscal there. Endorsed on the affidavit was a certificate of a notary, that the Commissioner who had made it was sworn in his presence, on the day of (omitting the dates of the day and month), and at the end of the certificate the notary had put the date, which was the same as the jurat of the affidavit: Held, that the recovery might pass, notwithstanding such omission.

Mr. Serjt. Onslow moved, that this recovery might pass, under the following circumstances:—

The warrant of attorney was taken and acknowledged at Cape Town, in the Cape of Good Hope, before two Commissioners, on the 19th July, 1819. One of the Commissioners, *George Cadogan*, made the usual affidavit of caption, and acknowledgment before the Deputy Fiscal at Cape Town, which affidavit was there sworn, on the 31st July following; and indorsed on the affidavit was a certificate of a notary public residing in Cape Town, that the Commissioner who had made the affidavit of the caption and acknowledgment, was sworn in his (the notary's) presence, to the truth of his same affidavit, before *P. B. Borchend*, on the day of , 1819. And he further certified, that the said *P. B. Borchend* was Deputy Fiscal, and as such, usually administered oaths, and had power to administer such oaths; and that the name *George Cadogan*, subscribed to the said affidavit, and also the name *P. B. Borchend*, subscribed to the jurat, were of their respective handwriting. At the bottom of this certificate, the notary public making it, had put the date of the 31st of July, 1819, his name and description, and also, as supposed, (for the wax was gone), his notarial seal. The only question was, whether the recovery should pass, there being a blank in the body of the certificate for the day and month when *George Cadogan* was sworn to the truth of the affidavit of caption and acknowledgment.—The learned Serjeant contended, that the recovery should be allowed to pass, notwithstanding this blank, and urged, that the fact of the

date of the certificate (31st *July*), being the same day as that of the jurat of the affidavit of caption, it was evidence, *primâ facie*, that the certificate was a certificate of the oath being taken on the same 31st *July*, and that it could not be of a subsequent day;—that, by the statute 23 *Eliz. c. 3. s. 2*, it was enacted, “that no recovery should be reversed for false or incongruous Latin, rasure, interlining, inserting of any warrant of attorney or proclamation, omission of the return of the sheriff, or any other want of form in words, and not in matter of substance,” and that in *Pigott on Recoveries* (a), it is stated, that “recoveries being judicial executions of the agreement of parties, the law gives them all favourable construction imaginable; and that the Judges even extend their powers to serve the parties’ intentions.”

1820.

 HINDE,
 Demandant.

The Court observed, that it was a careless proceeding; but were of opinion, that as the date was inserted at the bottom of the certificate, it was sufficient to supply the defect.

Fiat (b).

(a) Cap. 10, page 167.

(b) But see 23 *Eliz. c. 3. s. 5*, by which it is enacted, that “every person who shall take the knowledge of any fine or warrant of attorney, of any tenant or vouchee, for suffering any common recovery, or shall certify them, or any of them, shall, with the certificate of the award, or warrant of attorney, certify also the day and year wherein the same was acknowledged.”

1820.

Wednesday,
April 26.

DOE, on the demise of SEABROOK v. ROE.

The affidavit on which to move for judgment against a casual ejector, in the case of a vacant possession, where one copy of the declaration was sworn to have been fixed on the premises, and another served on the lessee, but not on the premises, it is necessary to state that such lessee was tenant in possession at the time of the service.

MR. Serjt. *Heywood* moved for a rule *nisi*, for judgment against the casual ejector in this case, on an affidavit, stating that the premises were shut up; that one copy of the declaration had been fixed on the gate-way of the yard, and another delivered to the lessee, on the 14th instant, being before the essoign day of this Term; but it did not state, that the copy was served on him on the premises. It was further sworn, that two years' rent was in arrear, and that the lessor had power to re-enter under the lease.—But as the affidavit did not state that the lessee was the tenant in possession at the time of the service,

The Court, on consideration, refused the rule (a).

(a) See *Doe, d. Turbury v. Roe*, 1 *Chit. Rep.* 506, where it appears necessary to state in the affidavit, that a copy of the declaration has been left on, as well as affixed to the premises.

Thursday,
April 27.DINSDALE, Assignee of the Sheriff of Middlesex v.
EAMES.

Where, in an action of debt, an assignment of a bail bond was taken, the defendant not having perfected bail, and an action being brought on the bond, he became bankrupt between plea and verdict, and obtained his certificate after final judgment:—Held, that he was discharged from the damages and costs of the latter action, as the debt on the bail bond was proveable under the commission.

MR. Serjt. *Pell*, on a former day in this Term, obtained a rule *nisi*, that the sum of £51, paid under a writ of *capias ad satisfaciendum*, might be restored by the plaintiff's at-

torney, to the defendant or his attorney. The payment had been made under the following circumstances :—The defendant was arrested, at the suit of the plaintiff, in *Easter Term*, 1819, in an action of debt, and bail not having been duly perfected, an assignment of the bail bond was taken, on the 3d of *June* in that year. Process was accordingly served on the defendant, in an action on the bond, to which an appearance was entered, and a declaration having been delivered, a plea was filed on the 17th of that month. In *November* following, a commission was issued against the defendant, and he was declared a bankrupt. In *Hilary Term*, 1820, the action on the bail bond was tried, and the plaintiff obtained a verdict. Judgment was accordingly signed in the same Term, and the defendant taken in execution for the damages and costs of such action, on the 29th of *March* last, on which day his certificate was allowed by the Chancellor, having been previously signed by the major part of his creditors, on the 8th of *February* preceding. The *ca. sa.* under which the defendant was arrested, was indorsed to levy £73, and the above sum of £51 was accordingly given to the plaintiff's attorney, in part payment.

1820.

DINSDALE
v.
EAMES.

Mr. Serjt. *Taddy* now shewed cause.—The only question is, whether a defendant in an action, who gives a bail bond to the sheriff, and becomes bankrupt, but after plea pleaded and verdict obtained, in a suit on the bond, is discharged from the damages and costs of such suit, if he obtains his certificate after final judgment is signed? The debt on the bail bond could not be proveable under the commission, because judgment was not obtained until long after it had issued. The cases since *Langford v. Ellis*(a), of *Ex parte*

(a) 1 H. Bl. 29, n.

1820.

 DINSDALE
 v.
 EAMES.

Hill (a), *Ex parte Charles* (b), *Walker v. Barnes* (c), and *Buss v. Gilbert* (d), establish this principle, that if the cause of action be not complete or perfect, even although the mere costs are only necessary for its completion, the debt cannot be proveable under the commission. [Mr. Justice *Burrough*.—*Ex parte Charles* is the leading case, but there, the damages were unliquidated, and incapable of being reduced to certainty, until after judgment.] In that case, there was a verdict before the bankruptcy, but in this it was afterwards, which makes it still stronger. If this had been an action of tort, and a verdict had ascertained the amount of the damages, before an act of bankruptcy committed by the defendant, still the debt could not be proved under the commission. The case of *Cockerell v. Owston* (e) bears the strongest resemblance to the present, where it was decided, that if a bail bond to a sheriff be not forfeited until after the bankruptcy, the debt cannot be proved under the commission, for it is a new and distinct cause of action. The case of *Boutefleur v. Coats* (f), where it was determined, that a certificate discharges a bankrupt from a debt accruing before the commission, although judgment be not obtained till after the certificate allowed, is contrary to principle and law; for costs cannot be proved under a commission, when a verdict is given after the bankruptcy; and Lord *Mansfield* held, that the penalty being forfeited, the debt was due, although execution could not be taken out for more than the damages; and the case of *The Overseers of St. Martin in the Fields v. Warren* (g), decided, that an unliquidated demand arising on a bastardy bond, was not proveable under a commission, as it was in the nature of debt upon a contingency, incapable of valuation, and consequently, that the penalty could not be considered as

(a) 11 *Ves.* 646.—(b) 14 *East*, 197. S. C. 16 *Ves.* 256.—
 (c) 1 *Marsh.* 346.—(d) 2 *Mauk & Selw.* 70.—(e) 1 *Burr.* 436.
 (f) *Cowp.* 25.—(g) 1 *Barnew. & Ald.* 491.

the debt, for the purpose of proof under a commission.

1820.

DINSDALE

v.

EAMES.

Mr. Serjt. Pell, in support of the rule.—The case of *Cockerill v. Owston* is distinguishable from the present, as it did not appear there, whether the bond was forfeited or not before the bankruptcy, and if it was not forfeited until afterwards, it is quite clear that it could not be proved under the commission. The case of *Bouteflour v. Coats* is not only in point, but is also undistinguishable from, and must govern the present; and the doctrine contained in that case has never since been impugned. The question in the case of *The Overseers of St. Martin in the Fields v. Warren*, arose on a bastardy bond, on which it was necessary to assign breaches;—but here, the original debt was created, and its amount ascertained on the forfeiture of the bond. If the damages had been unliquidated, the argument for the plaintiff might prevail. The general principle is, that if a demand in the nature of damages, be capable of being liquidated and ascertained at the time of the bankruptcy, so that a creditor can swear to the amount, he may prove it as a debt under the commission, as in an action of *assumpsit* on a *quantum meruit*. So, in *Ex parte Day* (a) it was held, that if a bond be given to replace stock on a given day, it may be proved, if the bond is forfeited before the bankruptcy of the obligor. The statute 5 Geo. 2. c. 30. s. 7, is confirmatory of this principle, as bankrupts are thereby discharged from all debts due or owing by them at the time of their bankruptcy. Here, the original debt was due at the time of the bankruptcy, and as bail were not perfected, the bail bond was assigned to the plaintiff. If, therefore, the defendant

(a) 7 Ves. 301.

1820.

 DINSDALE
 v.
 EAMES.

might be discharged from the original debt, he might be equally so, from this subsequent and substituted debt. In *Scott v. Ambrose (a)*, it was determined, that costs in an action bear relation to the original debt, and are to be reckoned parcel of it. If, therefore, the debt is discharged, by the debtor's having become a certificated bankrupt, so are the costs; and it was there further held, that costs in error, have the same relation as costs in the action. Independently of that case, however, *Bouteflour v. Coats* is of itself sufficient, to shew that the defendant is discharged by his certificate from the damages and costs incurred in the action on the bail bond, and that of *Ex parte Charles*, and the others which have established, that where the cause of action is incomplete, the debt is not proveable under the commission, are wholly beside the present question, as here the debt might have been sworn to at the time of the bankruptcy.

Lord Chief Justice DALLAS.—The rule that must govern cases of this description is perfectly clear, *viz.* that no debt can be barred by the certificate of a bankrupt, unless such debt be contracted with certainty before his bankruptcy. Here, the defendant had given a bail bond, and bail not having been perfected in the original action, which had been commenced against him, the amount of the original debt was clearly ascertainable before the bankruptcy, and therefore might have been proved under the commission. Independently of this, however, the case of *Bouteflour v. Coats* is precisely in point, and decisive of the present question—the principle of which has never since been over-ruled, or even questioned; and in *Scott v. Ambrose*, it was held, that costs in a suit have relation to the original debt. If, therefore, the debt be discharged, the same rule applies to costs,

and it appears that even costs in error may be assimilated to costs in a cause, and as constituting part of the original debt. On the decision of both these cases, therefore, I am of opinion, that this rule must be made absolute.

1820.
BINGHAM
v.
EAMES.

Mr. Justice BURROUGH.—I am of the same opinion. The case *Ex parte Charles* is wholly inapplicable to the present. That was an action for a breach of promise of marriage; and after verdict, but before judgment, the plaintiff took out a commission of bankrupt against the defendant, and it was held not to be a good petitioning creditor's debt. There, too, the damages were unliquidated until the judgment;—on which principle the decision of the Court turned. Here, however, there was a penalty which constituted a debt, proveable under the commission. In cases of annuities, the Court of Chancery has admitted the amount of the contingent debt to be valued and proved; the estimation being made according to the duration of the life of the annuitant (a). If this had been an action of *tort*, the case might have been different; but the substance of the action on the bail bond is to enable the plaintiff to recover the amount of his debt in the original suit. I fully concur with my Lord Chief Justice, in thinking that the case of *Bouteflour v. Coats* is precisely in point, the decision of which cannot now be doubted, and therefore, the defendant is discharged by his certificate, from the damages and costs incurred in the action brought against him by the plaintiff on the bail bond.

Mr. Justice RICHARDSON.—I am of the same opinion. The action on the bail bond was brought to recover the amount of the original debt. It is therefore the same in

(a) See *Ex parte Le Compte*, 1 Atk. 251.

1820.
 DINGDALE
 v.
 EAMES.

substance ; and from the case of *Scott v. Ambrose*, it appears that the costs are accessorial, and bear relation to the original debt. In Mr. Ford's MS. note of the case of *Graham v. Benton (a)*, where an action was brought against the defendant, a bankrupt, for a debt due before his bankruptcy, and judgment was given thereon, and a writ of error was brought, and then he obtained his certificate, and afterwards judgment was affirmed on the writ of error, and the defendant taken in execution for the debt and costs, the Court are made to say, "The defendant being a bankrupt, and having delivered up his effects, it was unjust to prosecute the original action ; and as he had no defence against that for want of his certificate, the writ of error was necessary to suspend execution till the certificate could be had ;—and though the costs on the affirmance are strictly a new demand, yet they ought to be considered as attendant upon, and springing from the original one : so the defendant ought to be discharged from both."

Rule absolute.

(a) Cited 14 East, 201.

Thursday,
 April 27.

MAHON v. MARTINEZ.

A plaintiff resident in *Ireland* is bound to give security for costs, although he may sometimes come over and sojourn in this country.

MR. Serjt. Pell, on a former day in this Term, had obtained a rule nisi, that the proceedings in this cause might be stayed, until the plaintiff gave security for costs, on an affidavit which stated, that he was resident in *Ireland*, or elsewhere, out of the jurisdiction of this Court.

Mr. Serjt. Onslow now shewed cause, on an affidavit of the clerk to the plaintiff's attorney, who swore, that the

plaintiff was alternately residing in *London* and *Dublin*, and contended, that he therefore did not come within the rule requiring him to give such security.

1820.

MAHON
v.
MARTINEZ.

But the Court held, that the affidavit in support of the rule was sufficient; and it was consequently made

Absolute (a).^a

(a) See 1 *Tidd*. 7th edit. 552.

• CROMACK v. HEATHCOTE.

Saturday,
April 29.

THIS was an action of trespass, brought against the defendant, as sheriff of the county of *Hertford*, for breaking and entering the plaintiff's house, and seizing and selling his stock and furniture, under a writ of *feri facias*.

Communications made by a party to an attorney are confidential, although they do not relate to a cause existing, or in progress at the time they were made. Therefore, where an attorney was applied to by a father, to prepare a deed by which his property was to be assigned to his son, and stated, that there was no consideration for the assignment, on which the attorney refused to prepare it, and it

At the trial of the cause before Chief Baron *Richards*, at the last Assizes at *Hertford*, the question was, whether the property belonged to the plaintiff or his father, who had assigned it by bill of sale to the former, shortly before the execution had issued against him (the father)? To prove that the assignment was fraudulent, the defendant offered to call an attorney, to whom the plaintiff's father had applied to prepare it, which he had declined doing, as he was aware that an execution had been previously issued against him. The father told him, that no consideration had been given for the assignment by his son, but that he was to consider

was afterwards drawn by another:—Held, that such attorney was precluded from giving evidence of that fact, in an action brought by the son, in which the validity of the deed was attempted to be disputed, although he was not employed in the cause.

1620.

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CHOMACK
 v.
HEATHCOTE.

that disclosure as a confidential communication. The attorney then absolutely refused to draw the deed, which was afterwards prepared by another attorney, who was also employed to conduct the present action. The learned Baron thought that this was a confidential communication, made by a client to his attorney, and therefore did not allow the latter to be examined as a witness; and the Jury found a verdict for the plaintiff, damages £300.

Mr. Serjt. *Taddy* now moved that this verdict might be set aside, and a new trial granted, and submitted, that the evidence of the attorney ought to have been received, as the rule, that confidential communications between attorney and client are not to be revealed, is confined to such communications only as are made with reference to professional business, during the relation of attorney and client, in the progress of a cause. Lord Chief Justice *Abbott*, in a late case (*a*), allowed an attorney to be examined as to a deed he had drawn respecting a dissolution of partnership. So, in *Duffin v. Smith* (*b*), which was an action of debt on bond, the plaintiff's attorney was admitted by Lord *Kenyon* to prove that the bond had been given on an usurious consideration. In *Cobden v. Kendrick* (*c*), where, after a compromise, though before the final conclusion of a cause, a party told his attorney, by way of exultation, that he had succeeded in recovering a sum of money to which he was not entitled, it was held, that the attorney might prove this fact, because it was not a confidential communication; and the Court there observed (*d*), that the difference is, whether the communication was made by the client to his attorney, in confidence, as instructions for conducting his cause, or a mere *gratis dictum*. In *The Duchess of Kingston's case* (*e*),

(a) *Wadsworth v. Hamshaw*, Sittings after Hilary Term, 1819.——

(b) *Peake's N. P. C.* 3d edit. 146.——(c) 4 *Term Rep.* 451.——

(d) *Id.* 432.——(e) 11 *St. Tr.* 253.

Lord *Mansfield* said, that an attorney may be called and questioned as to a collateral fact within his own knowledge, or to a fact which he might have known, without being entrusted as an attorney in the cause. The case of *Wilson v. Rastall* (a) decided, that an attorney, not employed as such, in the particular business which is the subject of enquiry, is not within the rule, although he may have been consulted confidentially. That case bears a strong analogy to the present; and *Du Barré v. Livette* (b), merely decided, that a person who acts as interpreter between an attorney and his client, stands precisely in the same situation as the attorney himself. Still, however, the rule is confined to communications made by a client to his attorney within the progress of the cause in which the parties may be engaged.

1820.

 CROMACK
 v.
 HEATHCOTE.

Lord Chief Justice DALLAS.—In this case, the plaintiff's father applied to an attorney to prepare a deed, the effect of which was, to assign his property to his son. The attorney, however, being aware of his circumstances, and that an execution had previously issued against him, refused to draw it. In *Wilson v. Rastall*, Lord *Kenyon* said (c), that "in order to see whether the party offered as a witness were privileged or not, it was necessary to enquire whether he was in the situation which he assumed to himself, viz. whether he was in a situation over whose conduct his client had an interest? and his Lordship observed, that it expressly appeared from his own evidence, that he was not, nor could he be employed as an attorney." Here, however, the party was an attorney, and the father went to consult him on professional business. I own, however, I was at first rather staggered as to what fell from my Brother *Taddy*, that protection can only be extended to

(a) 4 Term Rep. 753.——(b) Peake's N. P. C. 3d edit. 108.——

(c) 4 Term Rep. 758.

1820.

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CROMACK
v.
HEATHCOTE.

those communications which are made between attorneys and their clients, relative to a cause existing at the time, or about to be commenced when such communications are made. It does not appear to me, however, that the cases cited in support of that proposition bear it out. But it is quite clear, that they are inapplicable to the present, where the plaintiff's father went to an attorney, to prepare a deed, by which his property might be conveyed to his son, and having given him the necessary directions, he observed, that no consideration had been given for the assignment, on which the attorney refused to draw it. This must be considered as a confidential communication, and whether the attorney were employed in the cause or not, seems to me to be wholly immaterial, and consequently, I have not the least doubt but that his rejection as a witness at the trial, was not only perfectly right, but consistent with the long-established principles of law.

Mr. Justice BURROUGH.—I entertain no doubt whatever, but that the testimony of this witness was most properly rejected. It would be most mischievous, if a communication of this nature could be disclosed, and I take the rule to be, that wherever an attorney is consulted professionally by his client, the communications made to him must be considered as confidential, whether they relate to a cause then in progress or not.

Mr. Justice RICHARDSON.—If a party employ an attorney to sell an estate, and it turns out, on consulting him, that the title is defective, can such attorney disclose the defect? I never before heard that communications made by a client to his attorney were to be confined to those made in the progress of a cause; on the contrary, I have always understood that they extended to all professional business that may be conducted between them, and I therefore fully

concur with the Court in thinking, that the testimony of this witness was most properly rejected at the trial.

1820.

CROWACK

v.

HEATHCOTE.

Rule refused.

An application was also made for a new trial in this cause, on two other grounds:—first, that the assignment was in itself fraudulent; secondly, that there had been no change of possession, so as to vest the property in the plaintiff. Both these questions the Lord Chief Baron left to the Jury, on the evidence, and they found a general verdict for the plaintiff. Mr. Serjt. *Taddy*, in support of the latter objection, now cited the case of *Wardall v. Smith* (a), where it was held, that an assignment of personal property was void as against creditors, unless there be a complete change of possession, and that it is not enough that a person is put in to keep possession jointly with the assignor, and he relied on the expressions used by Lord *Ellenborough* in that case. But the Court held, that they were precluded from disturbing the verdict on those objections, as it negatived fraud, and observed, that the case of *Wardall v. Smith* had been frequently dissented from, and that from *Kidd v. Rawlinson* (b), and several subsequent decisions, the question whether a bill of sale be fraudulent in its concoction or not, is a matter of fact for a Jury to decide; and they intimated, that they would confer with the Chief Baron as to the change of possession—and on this day Lord Chief Justice *Dallas* said, that that learned Judge was perfectly satisfied with the verdict. The rule, therefore, as to those objections, was also

Refused.

(a) 1 *Campb.* 333.—(b) 2 *Bos. & Pul.* 59.

HOSACK and others, Assignees of OSBOURNE, a Bankrupt v. MASSON.

Saturday,
April 29.

THIS was an action of trover, brought by the plaintiffs, as assignees of *Osbourne*, a bankrupt, to recover from the de-

The owner of a ship consigned her to persons abroad, who

hypothecated her, and directed the Captain to sign a bottomry bond. On her arrival in *London*, he, by their direction, delivered the register to the defendant (the agent of the consignees), who gave it to their solicitor, to institute proceedings in the Court of Admiralty, on the bottomry bond. The ship was sold, by order of that Court, and the register decreed to be given up to the purchaser. The owner became bankrupt, and his assignees brought an action of trover for the register:—Held, that they could not recover, as they might have appeared in the Admiralty Court, and prevented the sale of the vessel, and as the delivery of the register to the purchaser, under the decree of that Court, was not a conversion.

1820.
HOSBACH
v.
MANSON.

fendant the certificate of register of the ship *Atalanta*, of which the bankrupt was the owner at the time of his bankruptcy.

At the trial of the cause before Mr. Justice *Burrough*, at *Guildhall*, at the Sittings after the last Term, it appeared that the bankrupt, in *July*, 1817, had consigned the ship to *West and Co.* in *Jamaica*, by the recommendation of the defendant, their agent in *London*, and who employed her improperly, and eventually obtained a bottomry bond on her, for her full value. The master swore that such bond was unnecessary, and that he was compelled to sign it, under the directions of *West and Co.* On her arrival in this country, he quitted her, and delivered her certificate of register, and other papers, to the defendant (being directed to do so by *West and Co.*), who having got the vessel reported and entered at the Custom-house, handed the papers over to the attorney of *West and Co.* to enable proceedings to be taken on the bottomry bond in the Admiralty Court. A suit was afterwards commenced there by *West and Co.* as the holders of the bond, and a proctor appeared for the plaintiffs, as assignees of *Osbourne* the owner. The ship was eventually sold by the order of that Court, who decreed the register to be delivered up to the purchaser, which was accordingly done.—For the plaintiffs it was contended, that the defendant was not justified in delivering over the register to *West and Co.*'s attorney, who gave it to the officer of the Admiralty Court, they having demanded it before the sale of the vessel—and that the detention by the defendant, in the first instance, was illegal, and consequently, that the delivery was a conversion. The learned Judge, however, was of opinion, that the plaintiffs were not entitled to recover, as they had not opposed the sale of the ship in the Admiralty Court, and that, even if they had, they might afterwards have objected to the delivery of the register; and he accordingly directed a nonsuit.

Mr. Serjt. *Vaughan* now applied for a rule *nisi*, that this nonsuit might be set aside, and a new trial granted, or that a verdict might be entered for the plaintiffs, and submitted, that although they might have objected to the delivery of the register to the purchaser of the vessel, under the decree of the Admiralty Court, still, that the defendant was guilty of a conversion, by receiving it from the captain, and handing it over to the attorney of *West and Co.* The proceedings there, afford no answer to the present action, as at the utmost, they can only go in mitigation of damages. The Admiralty decree did not apply to the register, to which the plaintiffs were unquestionably entitled, at the time the defendant received it from the master of the vessel. Had it been delivered to them, they must have been cited to bring it into the Court of Admiralty, and they would then have had an opportunity of objecting to the sale. The reason for their not appearing there was, because they had incurred the expence of bringing the present action. Besides, the suit there was ultimately dismissed, which amounted to an acknowledgment that the bottomry bond was fraudulent and void, and had been improperly obtained from the captain, who had been compelled to sign the same. Until a libel had been given by the defendant in the Admiralty Court, the plaintiffs could not enter into the merits, and the suit there was dismissed before libel, which is equivalent to a non-pros. Although, therefore, the plaintiffs may have avoided the opportunity of contesting the validity of the bottomry bond, and objecting to the sale of the ship, still, those circumstances afford no answer to the conversion of the register, which had been previously consummated.

1820.

HOBBACK
v.
MASSON.

Lord Chief Justice DALLAS.—I am of opinion that under the facts of this case, there is no ground whatever for the present application. It appears that the defendant was agent to *West and Co.* who were resident in *Jamaica*, and to whom the bankrupt had consigned a vessel, of which he

1820.

HOSACK
v.
MASSON.

was the owner. While there, she was hypothecated, and although the master said it was unnecessary, he signed a deed of hypothecation, as well as a bottomry bond. On the arrival of the vessel in this country, the register and other papers belonging to her, were delivered by the master to the defendant, by the direction of *West and Co.* who afterwards instituted a suit in the Admiralty Court on the bottomry bond. The defendant, in the first instance, delivered over the register to their attorney, for the purpose of commencing proceedings there, and it was afterwards handed over to an officer of that Court, who had competent jurisdiction to order such delivery, for the purpose of completing the sale of the vessel. That, therefore, was not an unlawful conversion, for the party would be liable to contempt if he had disobeyed such order. The plaintiffs had notice of the proceedings in the Admiralty Court, and might have opposed the order for the sale of the vessel, and it appears they might have interposed subsequently to that event. If this did not amount to an acquiescence of the sale on their parts, still, they took no steps whatever to oppose it. Afterwards, however, the Judge of that Court ordered the register to be delivered up, as being necessary to complete the title to the vendee on the sale of the ship. He had a competent jurisdiction so to do, and I therefore think that such a delivery cannot be deemed an unlawful conversion. At all events, the plaintiffs may have their remedy by bringing another action.

Mr. Justice BURROUGH.—When the facts of this case were fully understood at the trial, I entertained no doubt whatever. At first, they appeared to be complicated; but the proceedings in the Admiralty Court were eventually proved to have been regular. The plaintiffs, as assignees of the bankrupt, demanded the register from the defendant, on the 5th of *December*, 1818, when the supposed conversion took place, but the suit was commenced in the Admi-

ralty Court on the 28th of *November* preceding. After the commencement of that suit, the ship was seized, and the parties were cited to appear. The plaintiffs might have appeared three days after that citation, and it was proved that a proctor was present on their behalf. They might then have contracted for the vessel, or given bail, and disputed or prevented the sale; but they did neither. After the ship had been sold, it became necessary to give up the register to the vendee, for the purpose of completing his title. No objection was even then made by the plaintiffs, and the sale could not be perfected without the delivery of the register, which was ordered by the Court of Admiralty, having full jurisdiction to make such an order. The Captain had a property in the vessel, although he was not an equal part owner with the bankrupt, and when he delivered the register to the defendant, nothing whatever was said as to the bottomry bond. I therefore am of opinion, that the plaintiffs are not entitled to recover in this action.

1820.
HOSSACK
v.
MASSON.

Mr. Justice RICHARDSON.—I am entirely of the same opinion. The defendant, in the first instance, received the register through the directions of *West and Co.* and it was eventually delivered over to the purchaser of the ship, in pursuance of a decree of the Court of Admiralty, which had competent jurisdiction to make such an order. That cannot amount to a conversion.

Rule refused.

1820.

Saturday,
April 29.*In Re PEARSON.*

The Court will grant a *habeas corpus* in the first instance, to bring up an infant, who had absconded from his father, and was detained by a third person without his consent.

Mr. Serjt. *Blosset* moved, that *Pearson* the younger, might be brought up on a *habeas corpus*, on an affidavit which stated, that he had absconded from his father, without his knowledge or consent, to the house of a person by the name of *Richardson*, who was then resident in *Yorkshire*; that the father went to enquire for him there, when *Richardson* said, that he was gone, and not then an inmate in his house; that a constable afterwards wrote the father, that his son was still there; that the former again went there, when *Richardson* confined his son, and said that he was his (*Richardson's*) apprentice; that the son was only thirteen years of age, and that his father, although assisted by the constable, could not take him out of *Richardson's* house, he having locked him up for the purpose of preventing them from so doing.

On the Court's enquiring, whether this was not in the nature of an application for a rule *nisi*, that the writ might issue? the learned Serjeant referred to *Wood's* case (a), to shew that this Court has a general jurisdiction to grant writs of *habeas corpus*, in all cases whatsoever, in the first instance. He also cited the case of *The King v. Penelope Smith* (b), on which the application was

Granted (c).

(a) 3 Wils. 172.——(b) 2 Stra. 982.

(c) In the case of *The King v. Delaval**, Lord Mansfield said, that "In cases of writs of *habeas corpus*, directed to private persons, 'to bring up infants,' the Court is bound, *ex debito justitiæ*, to set the infant free from an improper restraint, but they are not bound to deliver them over to any body, nor to give them any privilege;—that this must be left to their discretion, according to the circumstances that shall appear before them."

* 3 Burr. 1436.

1830.

BRANDON and another v. HUBBARD.

Tuesday,
May 2d.

THIS was an action of *assumpsit*, for work and labour. At the trial of the cause, before Mr. Justice *Hobroyd*, at the last Assizes at *Stafford*, it appeared that the plaintiffs were in partnership as attorneys, and had commenced this action against the defendant, for the costs of preparing a replevin bond by one of the plaintiffs, and for the attendance of the other as a witness at the trial. *Brandon* had been appointed a replevin clerk to the Sheriff, and all the business relating to the duties of that office was transacted by him alone. It was proved, that the defendant came to the plaintiffs' office, where their general business was transacted, for the purpose of replevying goods, and directed a bond to be taken in sufficient sureties, which was accordingly filled up, and the stamp provided in their office. For the defendant it was insisted, that the present action was not maintainable at the suit of both the plaintiffs, as partners, but should have been brought in the name of *Brandon* only, as he alone had been appointed replevin clerk to the Sheriff, and consequently that the expences of preparing a replevin bond could be paid to him only. The learned Judge was of opinion that the objection was well founded, and accordingly directed a nonsuit. Leave, however, was given the plaintiffs to move that it might be set aside, and a verdict entered for them for £4. 13s. 6d. being the amount of the costs of preparing the replevin bond.

A. and B. were in partnership as attorneys. A. alone was appointed replevin clerk to the Sheriff:—Held, that an action for the expences of preparing a replevin bond must be brought by A. alone, although it was executed in the office where he and B. carried on their joint business.

Mr. Serjt. *Peake* accordingly now moved, that the nonsuit might be set aside, and a verdict entered for the plaintiffs for that sum. By the statute 1 & 2 Ph. & M. c. 12. s. 3, it is enacted, that the Sheriff shall appoint four deputies, who shall have authority in his name

1820.
BRANDON
v.
HUBBARD.

to make replevies, in such manner as the Sheriff ought to do, but no replevin bond is directed to be taken by that statute; and by the 11 *Geo. 2. c. 19. s. 23*, Sheriffs, and other officers having authority to grant replevins, may take, in their own names, from the plaintiff, and two responsible persons as sureties, a bond in double the value of the goods distrained, &c. and such Sheriff, or other officer, shall, at the request and costs of the avowant, assign such bond to him, by indorsing and attesting the same. Neither of those statutes, which are the only ones relative to officers in replevin, contain any direction respecting a remuneration to be made, either to the Sheriff, replevin clerk, or other officer who should prepare the bond. Although, therefore, one of the plaintiffs only was the replevin clerk, still, as he was in partnership with the other, the costs of preparing it constituted a debt due to both, as the stamp was provided by them jointly, and the business done relative to the bond formed part of the joint account of the partnership. In *Willeit v. Chambers* (a), it was held, that if two are partners as attornies and conveyancers, and one receive money to be laid out on mortgage, the other is liable for the amount, although his partner give a separate receipt for it. Both the plaintiffs, therefore, might join in bringing the present action. If it had been brought against them by the distributor of stamps, for any matter or deficiency as to the stamp on the bond, it would have been no answer for one of them to have stated, that he alone was liable as a replevin clerk.

Lord Chief Justice DALLAS.—It appears that the learned Judge who tried this cause thought the objection taken by the defendant was well founded, and therefore directed a nonsuit; and I entertain no doubt whatever that his direction was perfectly right. It was the duty of *Brandon* alone

to make out and prepare the replevin bond, he alone being the replevin clerk, and his partner having no right whatever to interfere;—although no remuneration is given by statute to a replevin clerk, for the expences of preparing a replevin bond, still, as *Brandon* alone acted in that capacity, the action should have been brought in his name only.

1820.

BRANDON
v.
HUBBARD.

Mr. Justice BURROUGH concurred.

Mr. Justice RICHARDSON.—The defendant applied to *Brandon* only, for the purpose of having a replevin bond prepared, and such application was made to him in his capacity of replevin clerk, and not as a partner with the complainant, for business conducted by them on their general account.

Rule refused.

MORLEY v. LAW and BARRETT.

Tuesday,
May 2.

MR. Serjt. Cross, on a former day in this Term, had obtained a rule nisi, that the *testatum capias ad respondendum*, on which the defendants had been arrested in this cause, and the proceedings thereon, might be set aside for irregularity, and that the bail bond which had been given, might be delivered up to be cancelled, on the ground of a misnomer in the plaintiff's christian name. He founded his motion on an affidavit which stated, that she had sued by the christian name of *Mary*, her real name being *Martha*, and that she had never been known by the former appellation. He observed, that as no declaration had been filed, the proceedings might be set aside on payment of the costs of this motion; and relied

The misnomer of a plaintiff in a writ under which the defendant is arrested, can only be taken advantage of by plea in abatement.

1820.
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 MORLEY  
 v.  
 LAW.

on the case of *Wilks v. Lorck* (a), where it was held, that if a defendant be arrested by a wrong christian name, the Court will interfere, and discharge him on motion, and not leave him to plead his misnomer in abatement.

Mr. Serjt. *Vaughan* now shewed cause.—Here, there is a misnomer in the plaintiff's christian name; the defendants therefore might have treated the process as a nullity: or, if the plaintiff had declared, they might have pleaded in abatement; but such misnomer affords no ground for setting aside the proceedings on a motion of this description.

Mr. Serjt. *Cross*, in support of the rule.—The defendants are not bound to wait until the plaintiff has declared, in order to put in their plea in abatement;—the irregularity might have been waived by appearance.—In *Wilks v. Lorck*, the defendant was in custody, and shewed by affidavit that he was never called by the name of *Bernard*, until the sheriff had arrested him by that name; and no distinction can be drawn between a misnomer of the plaintiff or of the defendant.

Lord Chief Justice DALLAS.—This is a case of a misnomer in the christian name of the plaintiff. In *The Clerk of the Trustees of Taunton Market v. Kimberley* (b), it was held, that a misnomer of the plaintiffs should be pleaded in abatement, and could not be moved in arrest of judgment. In *Hole v. Finch* (c), where a defendant had a wrong christian name and addition given him in a writ of *capias*, and appeared, and put in bail by his right name and addition, and the plaintiff declared against him by such right name and addition, the Court would not interpose, and set aside the proceedings for irregularity. In *Gardner v. Walker* (d),

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(a) 2 Taunt. 399.——(b) 2 Sir W. Bl. 1120.——(c) 2 Wils. 393.——  
 (d) 3 Austr. 935.

where the name of the plaintiff was mistaken in the process and subsequent pleadings, and the mistake was discovered before trial, the Court of *Exchequer* gave leave to amend, while all was in paper, and a distinction was there drawn between the misnomer of a plaintiff and defendant; and Mr. Baron *Thompson* doubted whether, if the amendment had not been moved for, the misnomer would have been a ground of nonsuit, as he observed the objection might have been taken by a plea in abatement, which seemed a proper mode to take advantage of it. In *Wilks v. Lorck*, the defendant was discharged, on the ground that the process on which he was arrested was void *ab initio*, and that the sheriff who took him was a trespasser, and liable to an action of false imprisonment. I therefore think that the misnomer in this case can only be taken advantage of by a plea in abatement.

1820.

MORLEY  
v.  
LAW.

*Per Curiam.*

Rule discharged (a).

(a) See *Kingston v. Llewellyn*, ante, page 317.

GRAY and Others v. SHILLING.

Wednesday,  
May 3.

THIS was an action on the case, brought by the plaintiffs, as proprietors of a stage coach, against the defendant, a toll-

Where, by a local turnpike act, 2 Geo. 3. c. 67, a certain toll was im-

posed on carriages, and not on the horses drawing them, with a provision that, no persons having paid such tolls, and producing a ticket, should be again liable on the same day—and by a subsequent local act, 49 Geo. 3. c. 28, reciting the former one, the old tolls were repealed, and others imposed in respect of the horses drawing, and not on the carriages, but all the provisions of the former act were to be continued as fully as if they had been re-enacted:—Held, that toll having been paid on horses passing with a carriage, no new toll was demandable on the same horses returning the same day, although drawing a different carriage.

1820.

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GRAY

v.

SMILLING.

gate keeper, for detaining their coach and horses, for non-payment of toll alleged to be due under the 2 Geo. 3. c. 67, and 49 Geo. 3. c. 28. The declaration stated, that a certain toll-gate, situate in the parish of *Lamberhurst*, in the county of *Kent*, commonly called *Lamberhurst Pound Gate*, erected, standing, and being upon and across a certain public highway in that parish, was and is a gate, erected by virtue of a certain act of parliament, made and passed in the 2 Geo. 3. intituled, "An act for continuing, enlarging, and rendering more effectual, so much of an act made in the 14 Geo. 2. as related to the amending and repairing the roads leading from *Kipping's Cross* to *Lamberhurst Pound*, *Pullen's Hill*, and *Flimwell*, in the said county of *Kent*;" and that the plaintiffs, after the passing of the said act, and after the passing of a certain other act of parliament, made and passed in the 49 Geo. 3. intituled, "An act for continuing the term, and enlarging the powers of two acts of his present Majesty, for repairing the roads from *Kipping's Cross* to *Lamberhurst Pound* and *Pullen's Hill*, in the county of *Kent*, and to *Flimwell Vent*, in the county of *Sussex*," and certain other roads in the said acts described; to wit, on the 21st of *June*, 1819, at the parish of *Lamberhurst* aforesaid, in the county aforesaid, were lawfully possessed of divers, to wit, four horses, which then and there drew a certain coach of the plaintiffs', in and along the said highway, and through the said toll-gate, and that for their so passing through the same, the plaintiffs paid to the defendant, being the toll-gate keeper appointed to collect the tolls at the said gate, the toll by him demanded and due in that behalf, by force of the statute in such case made and provided, and obtained and received from the defendant, so being such toll-gate keeper, a proper and sufficient ticket, denoting the due payment of such toll; and that afterwards, and before twelve o'clock at night of the same day, to wit, at three o'clock of the afternoon of that day, the same horses were lawfully

drawing another and different coach of the plaintiffs, in and along the said highway, and near to the said gate, for the purpose of passing through the same free of toll, and for that purpose the plaintiffs then and there presented and shewed to the defendant the aforesaid ticket, and demanded permission of the defendant, as and still being such toll-gate keeper, to pass through the said gate with the said horses, and the said last-mentioned coach, free of toll, according to the form of the statute, &c.:—yet that the defendant, well knowing the premises, but contriving to injure the plaintiffs, did not nor would, suffer or permit the said horses, with the last-mentioned coach, so to pass through the said gate free of toll, but wholly refused so to do, and, on the contrary thereof, falsely and deceitfully pretending that a certain toll, to wit, the sum of 1s. 4d. was due and payable to the defendant, under and by virtue of the statute, &c. to wit, on, &c. at, &c. aforesaid, wrongfully and injuriously, closed and fastened the said gate, and kept and continued the same so closed and fastened, for a long space of time, to wit, for the space of one hour, and thereby wrongfully and injuriously stopped and detained the said horses, and last-mentioned coach, and prevented the same from passing through the said gate, for the said space of time, and until the plaintiffs paid to the defendant the said sum of money, so pretended to be due and payable as aforesaid, contrary to the form of the statute, &c.: By means whereof the plaintiffs have been and are greatly injured and damnified.

1820.
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 GRAY  
 v.  
 SMILLING.

To this declaration the defendant demurred generally, and the plaintiffs joined in demurrer. The cause now came on for argument, when

Mr. Serjeant *Taddy*, in support of the demurrer, observed, that the only question was, whether a person who has paid toll once for horses drawing a carriage on the road in question, is bound to pay toll a second time on the



1820.

GRAY  
v.  
SHILLING.

same day, for the same horses, on repassing or returning on the same road, with a different carriage? That will depend on the construction of the 49 *Geo. 3. c. 28 (a)*, which was passed for continuing the term and enlarging the powers of two former acts for repairing the same road. There is no clause in that statute exempting horses returning or passing a second time through the same gate, on the same day, but drawing a different carriage, from the payment of a new toll;—the only exemptions being on horses drawing materials for the use of the road, or the purposes of agriculture—and where exemptions are expressly mentioned, others cannot be implied. The 49 *Geo. 3.* contains a general re-enactment of all the provisions in 2 *Geo. 3. c. 67 (b)*, subject only to amendments and alterations con-

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(a) By which (after reciting the 2 *Geo. 3. c. 67*, and 57 *Geo. 3. c. 80.*), it was enacted, that those acts, and all and every the powers, authorities, provisions, regulations, penalties, forfeitures, clauses, matters and things, therein respectively contained, except such as relate to exemptions from stamp duties, and except such as are thereby varied, altered, or repealed, should be, and they were thereby further continued for and during the term thereafter mentioned, as fully and effectually, to all intents and purposes, as if the same were repealed and re-enacted in the body of that act, but subject nevertheless to the amendments, alterations, variations, and additions therein contained, and which should commence and take effect immediately upon the passing of that act: And after reciting that it was deemed expedient that the tolls in and by the said recited acts granted or authorized to be taken on the said roads, should be repealed, and other and greater tolls granted instead thereof, it was enacted, that all and singular the tolls granted or authorized by the said recited acts to be taken on the said roads, should, from and after the second *Monday* next after the passing of that act, be, and the same were thereby repealed, and that, instead thereof, there should be demanded and taken, at all the gates and turnpikes erected or continued by virtue of the said recited acts, or that act, the several tolls following, *viz.*—For every horse, mare, gelding, mule, or other beast drawing any carriage, the sum of four-pence; for every horse, mare, gelding, mule, or other beast, laden or unladen, and not drawing, the sum of one penny.

(b) By which (after reciting the 14 *Geo. 2.*) it was enacted, that, from and after the 1st of *June*, 1762, it should be lawful for the trustees appointed to put that act in execution, to demand and take the several tolls and duties thereafter mentioned, instead of the tolls and duties laid and made payable by the former act, of the 14 *Geo. 2.*, before

tained in the former. The only point, therefore, is, whether the exemptions in the 2 Geo. 3. are re-enacted in the 49 Geo. 3. It is quite clear they are not, as they are varied by the latter statute, and even if they were re-enacted, it would be beside the present question, as by the 2 Geo. 3. the toll was imposed on carriages passing through the gate, and by the 49 Geo. 3. on the horses drawing them; and the former contained a provision, that no person who had paid tolls should be liable to pay again for returning through the same gate on the same day, but that if they passed with a carriage a third time on the same day, then that they should be liable to pay the toll imposed on such carriage, and receive another ticket, which should entitle them to return once more toll free. As, therefore, there is no clause in either act exempting horses passing a second time through the same gate, drawing a different carriage, every such carriage is liable to a distinct toll, although it may be drawn by horses

1820.  
  
 GRAY  
 v.  
 SHILLING.

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any cattle or carriage whatsoever should be permitted to pass through any bar or gate to be erected by virtue of that act, on any part of the roads leading from *Kipping's Cross*, to *Lamberhurst Pound*, *Pullen's Hill*, and *Flimwell Vent*, in the county of *Kent*, viz.—For every coach, &c. drawn by more than four horses, one shilling; and drawn by three or four horses, nine-pence; and by two horses, sixpence; and by one horse, three-pence;—For every waggon, &c. the tolls therein mentioned;—For every horse, laden or unladen, and not drawing, one halfpenny: Provided, that no persons having paid the tolls and duties thereby directed to be paid, at any of the gates or turnpikes erected by virtue of that act, through which such persons should pass with any horse or cattle, and producing a ticket that such toll was paid, (which ticket the collector was required upon demand to give), should be liable to pay again for returning ever so often through the same gate or turnpike the same day, or before twelve of the clock at night, with the same horse or other cattle; but if any persons should pass the same day through the said turnpike a third time, with any carriage whatsoever (with wood for firing excepted), then such persons should be liable again to pay the said toll or duty thereby imposed, on such respective carriage, and to receive another note or ticket, which the collector was required to deliver, which should entitle them to return through the same gate, with the same carriage, upon the same day, once more, toll free, and so *toties quoties*, for every third time the said persons should pass the same day through the same gate or turnpike, on any of the said roads, with the said carriage as aforesaid.

1820.  
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 GRAY
 v.
 SHILLING.

which have previously passed through the toll-gate with another carriage on the same day.

Mr. Serjt. *Bosanquet*, *contra*.—Where acts of parliament of this description impose duties on a subject, they must be construed according to their plain meaning, and with reference to their subject-matter ;—and the intention must be clear before the Court will allow such duties to be imposed. By the 2 *Geo. 3* (a), a toll was imposed on carriages, and not on the horses drawing them, and for every horse not drawing, the toll of one halfpenny was to be taken. The tolls, therefore, to be taken by that statute for carriages and horses were perfectly distinct, and it was thereby provided (b), that tolls were to be paid but once a day, by persons passing through the gate with horses, but that if carriages passed a third time through the gate, such persons should be liable to pay a second toll, which should entitle them to return with the same carriage once more toll free, on the same day. If, therefore, the same horses had returned with a different carriage, or the same carriage had passed through with different horses, on the same day, such carriage would be exempt from the payment of toll ; for in *Williams v. Sangar* (c), it was held, that an exemption in a turnpike act from the payment of toll more than once in a day, for passing or repassing with the same carriage or horse, exempted a traveller from paying a second time in the day, for the passage of the same carriage, though drawn by different horses, being the same in number ; and the reasoning of Mr. Justice *Grose* and Mr. Justice *Le Blanc*, in that case, is precisely in point. Here, the 49 *Geo. 3*. makes two material alterations from the former statute, the one, by the increase of tolls, and the other by imposing them on horses instead of carriages ; but the powers contained in the 2 *Geo. 3*. except certain matters which were varied or re-

(a) Page 375.——(b) Page 380.——(c) 10 *East*, 66.

pealed by the 49 Geo. 3. were to continue as if the same were repealed and re-enacted, but subject to the alterations therein contained. It was the intention of the legislature, that the provisions in the latter statute should be carried into effect as in the former. As, therefore, carriages form no object of the provisions in the latter act, the horses drawing them may be exempted on returning, by virtue of the provision containing the exemption in the former statute. It has been contended, however, that there is no clause in either of the statutes, exempting horses passing a second time through the same gate, and therefore that every different carriage is liable to a distinct toll every time it passes through the gate, although it may be drawn by the same horses on which a toll had been before paid. If such an alteration had been intended by the latter statute, that carriages or horses returning the same day should pay toll a second time, there would have been an express provision to that effect; but the only distinction between the two statutes is, that in the latter, tolls are to be imposed on the horses instead of the carriage; and it is further enacted by that statute (*a*), that the tolls to be taken by virtue of that act, are to be vested in the trustees, and collected and disposed of in the same manner as is contained in the previous acts, respecting the tolls thereby authorized to be taken.

1820.

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GRAY
v.
SMILLING.

Mr. Serjt. *Taddy*, in reply.—The case of *Williams v. Sangar* is inapplicable to the present, as it was decided on a different act of parliament, relating to a different road, and the exemption there was, that no person should be subject to the payment of toll more than once in any one day, for passing and repassing with the same horse or carriage. In this case, there was no express exemption of that nature, and even if the exemptions in the 2 Geo. 3.

1820.
~
GRAY
v.
SHILLING.

had been re-enacted, they would not be applicable to the present case. Here, too, the horses returned with a different carriage; they would therefore not be exempted by the 2 Geo. 3.; for the toll was thereby imposed on *such respective carriage*, which must imply the same carriage which had previously passed on the same day. The defendant, therefore, is entitled to judgment.

Lord Chief Justice DALLAS.—I think the plaintiffs are here exempted from the payment of the tolls in question. This case must be governed by the decision in that of *Williams v. Sangar*. There, a toll was imposed on every carriage and on every horse passing through the gate, and exempted any person from paying more than once in a day, for passing or repassing with the same carriage or horse; and it was held, that a traveller was exempted from paying a second time in the same day for the passage of the *same* carriage, though drawn by *different* horses, being the same in number. It was therefore there deemed immaterial whether the carriage was drawn by different horses or not. Here, by the 49 Geo. 3. a toll is imposed on every horse drawing any carriage. The merely imposing a toll on a horse, instead of a carriage, makes no difference whatever as to the exemption. The clauses of exemption in the 2 Geo. 3., are fully adopted and re-enacted by the 49 Geo. 3, except where they are varied, altered, or repealed. It would be putting too extensive a construction on the latter statute, to infer that the legislature intended that an alteration should be made as to those exemptions; and even if the case of *Williams v. Sangar* had not been decided, I should have thought, from the construction of both these statutes, that horses having drawn a carriage through the gate in question, for which toll had been paid, would not be liable to pay a second time on the same day, although they repassed through the gate with a different carriage.

Mr. Justice BURROUGH.—In this case, it must be considered, that the clauses of exemption in the 2 Geo. 3. c. 67, are adopted and re-enacted by the 49 Geo. 3. c. 28, so as to be applicable to the same subject; and this appears to me to be the intention of the legislature, by the spirit of the latter statute; and by the provision in the former, it is clearly expressed, that no person having paid toll shall be liable to pay again for returning through the same gate on the same day.

1620.
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GRAY
v.
SHILLING.

Mr. Justice RICHARDSON.—I am of the same opinion; and think that, by the provisions of the latter statute, all the exemptions from the payment of toll mentioned in the former, are adopted and re-enacted. It is true, that the latter has introduced a new subject-matter, by imposing a toll on horses, instead of carriages. By the former act, horses returning, or repassing through the gate a second time, were exempted from such payment; and by the latter no toll whatever was imposed on carriages, but was transferred to horses alone. I therefore concur with the Court in thinking, that the plaintiffs are exempted from the payment of the toll in question, on the construction of both these statutes, as well as on the decision of the Court of *King's Bench*, in the case of *Williams v. Sangar*.

Judgment for the plaintiffs.

1820.

Thursday,
May 4,

GRIMES v. JOSEPH, a Prisoner.

Where a defendant in custody had been charged with a declaration as of Trinity Term, and absconded during the long Vacation, but did not return into custody until Hilary Term following, the Court refused to discharge him, although the plaintiff had not signed judgment before the end of such Hilary Term.

MR. Serjt. *Vaughan*, on a former day in this Term, had obtained a rule *nisi*, that the defendant might be discharged out of custody, as to the plaintiff in this cause, he not having proceeded to final judgment against him in due time. He founded his motion on an affidavit, which stated, that the defendant being in the custody of the Warden of the *Fleet*, was charged with a declaration at the suit of the plaintiff, on the 20th of *July* last, as of the preceding *Trinity* Term; that he was shortly afterwards removed by *habeas corpus* to the *King's Bench*, where, having procured the rules, he, in the beginning of *October* last, absconded to *France*, and did not return until the last Term; and that the plaintiff had not signed judgment against him up to the last day of that Term.

Mr. Serjt. *Peake* now shewed cause, and submitted, that the plaintiff had two Terms after the defendant's return, in which he might cause judgment to be signed against him; that if the plaintiff had proceeded in the action, he must have demanded a plea from the defendant, and served the usual rules on him, which could not be done during his absence from this country; and that, even if final judgment had been entered up, he could not have charged the defendant in execution.

Mr. Serjt. *Vaughan*, in support of the rule, insisted, that the rules might have been left with the turnkey of the prison, and that the Marshal would have been liable if the defendant was not within his custody, so as to be charged in execution.

But the Court observed, that the rule as to signing judgment within a certain time, against defendants in custody, did not apply in this instance, as the only object of that rule was to prevent unnecessary custody. The omission of the plaintiff to sign judgment did not produce the effect of detaining the defendant in custody; and they therefore ordered the rule to be

1820.

GRIMES
v.
JOSEPH.

Discharged.

HALFORD v. DILLON.

Thursday,
May 4.

THIS was an action of replevin, brought by the plaintiff, for taking and detaining his corn and goods. The defendant avowed for four years rent in arrear, of certain premises which he alleged to have been holden by the plaintiff as tenant to him. Plea in bar, traversing the tenancy *modo et*

By a marriage settlement, lands were limited to the use of the settlor for life, remainder to his first and other sons in tail male, with

reversion to the settlor in fee. A son, the issue of the marriage, devised the same lands to his father (the settlor) for life, with remainder to his two sisters of the half-blood in fee, and died without issue in the life-time of the settlor, who accepted certain benefits under his will, and afterwards devised the estate after the respective deaths of his daughters without issue male, (which event took place), to A. for life, with divers remainders over, under which latter will the plaintiff claimed to be entitled. On the part of the defendant, it was contended, that the son having, by will, taken upon himself to devise the estate to his father (the settlor) for life, with remainder to his sisters in fee, and that the father having accepted certain benefits devised to him by the said will of his son, had thereby elected to confirm the will, and by such acceptance and election had either divested himself of the reversion limited to himself by the original settlement, or was estopped from setting up that settlement, or controverting the right of his son to dispose of the fee to his two sisters; and further, that the father having admitted an agreement by him to convey the estate immediately to his son, in consideration of the payment of a certain sum, and an annuity to the father, with a proviso, that if the son died in the life-time of the father, the conveyance was to be wholly void;—the Jury should have been directed to presume some conveyance enabling the son to dispose of the fee by his will:—Held, however, that the sisters took no estate under the will of their brother; it being clearly the intention of the settlor to avoid the alleged conveyance in the event which had happened, and the Court would rather presume such a conveyance as was consistent with that intention, and which might have operated under the statute of uses, by re-vesting the use in the father, in the event contemplated, without the necessity of any entry:—Held also, that letters of a party under whom the plaintiff did not claim, were inadmissible in evidence to affect the title of the latter.

1820.
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 HALFORD  
 v.  
 DILLON.

*formd*, on which issue was joined. At the trial of the cause before Mr. Justice *Richardson*, at the Summer Assizes at *Worcester*, 1819, it appeared that the plaintiff was a mere nominal party, but that the real plaintiff in the action was Sir *William Parker*, Bart. to whom the present plaintiff had attorned and paid rent. The circumstances of the case were as follows:—

Sir *Henry John Parker*, Bart. being seised in fee of the manor of *Talton*, and of a house in *Salisbury Court*, *Fleet Street*, and being possessed of a farm in the manor of *Tredington*, held under a lease for lives from the Bishop of *Worcester*, by indentures of lease and release, dated the 1st and 2d of *October*, 1741, he, in consideration of marriage with *Catherine Page*, his second wife, conveyed the before mentioned estates to trustees, to the use of the said Sir *H. J. Parker*, for life, with remainder to his first and other sons in tail male; remainder to the use of Sir *H. J. Parker* in fee. The issue of the marriage were, a son, *John Parker*, and two daughters, *Catherine* and *Margaret Sophia*. *John Parker*, on attaining the age of twenty-one, in the beginning of the year 1766, became seised of and entitled to certain other estates, and also took an estate tail in remainder in those comprised in the settlement of 1741; and by his will, dated the 2d of *August*, 1769, he devised all his freehold and other estates to his father, Sir *H. J. Parker*, for life, and after his decease, the estate he had lately become entitled to, upon trust, for the benefit of his sisters, *Catherine* and *Margaret Sophia*, and their issue. He also devised, after the decease of his father, the manor of *Talton*, &c. and all other estates whatsoever, which descended to him from his father, to his two sisters, *Margaret* and *Ann Parker* (daughters of Sir *H. J. Parker* by his first wife), their heirs, executors, &c. for ever, as tenants in common. *John Parker* died in *September*, 1769, unmarried, and without issue;—his father, and *Margaret* and *Ann Parker*, his sisters

of the half-blood, and *Catherine* and *Margaret Sophia*, his sisters of the whole-blood, and co-heiresses at law, surviving. Sir *H. J. Parker*, on the death of his son, proved his will, and enjoyed the estates devised to him during his life. By his will, dated the 10th of *November*, 1769, Sir *H. J. Parker* devised his manor of *Talton*, and all other his freehold estates, to trustees, with remainder as to one undivided moiety of all the premises, to the use of his daughter *Margaret*, for life, with limitations to her first and other sons successively, in tail male, and as to the other moiety, to the use of his daughter *Ann*, with like limitations to her first and other sons, with divers ulterior remainders, including a limitation to Sir *William Parker*, for life, and to his first and other sons, in tail male, declaring it to be the meaning of his will, that the above-mentioned estates should, after the decease of his daughters, *Margaret* and *Ann*, without issue male, constantly descend to the right heir male of the *Parker* family, in the manner he had above limited the same, as such heir male would inherit his title; it being his intent, that such his estates and title should descend and be enjoyed together, as long as the laws of *England* would permit. The testator bequeathed the residue of his personal estate to his daughters, *Margaret* and *Ann*, and appointed them his executrixes—and died, in *October*, 1771, leaving them, and his daughters, *Catherine* and *Margaret Sophia*, his co-heiresses. On his decease, *Margaret* and *Ann* proved his will, and entered into possession of the estates devised to them by their father and brother. *Margaret* died in *May*, 1785, unmarried, having, by her will, dated 1st of *May*, 1780, devised to her sister *Ann*, in fee, her moiety of the estates devised to her and herself by their brother *John*, and all other her estates, and appointed her residuary legatee and executrix. On the death of *Margaret*, *Ann* entered into possession of the whole of the estates devised to her by her father, brother, and sister;—and by her will, dated the 1st of *August*, 1811, she devised, among

1820.  
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 HALFORD
 v.
 DILLON.

1820.

 HALFORD
 v.
 BILLOW.

other estates, the house in *Salisbury Court*, to the defendant, and his heirs, and the manor of *Talton*, and other estates, to *Harry Parker*, father of *Sir William Parker*, in fee; and she appointed *Sir William Parker* executor of her will, with a legacy of 500*l.* bequeathing the residue of her personal property to the defendant and his sister. *Ann Parker* died on the 26th of *January*, 1814, unmarried, leaving the defendant her heir at law, and *Sir William Parker* proved her will. The devise to *Harry Parker* lapsed by his death, in the life of *Ann*, the testatrix.

The defendant put in evidence, at the trial, a bill in equity filed by him against *Sir William Parker*, and his answer thereto, in which answer the latter admitted that he believed that articles of agreement, in writing, had been executed between *Sir H. J. Parker* and his son *John*, in the year 1766, in consideration of which, and of a conveyance of his, *Sir H. J. Parker's*, interest and reversion in the estates comprised in the settlement of 1741, his son agreed to pay him the sum of £700, and an annuity of £200 during his life, but that such agreement was subject to a proviso, making it void in the event of the death of the son in the life-time of the father, and which event had actually happened. It also appeared, that the plaintiff (*Halford's*) farm, consisting of the estate at *Talton*, was demised to him by lease, in 1805, by *Ann Parker*, to hold from *Michaelmas* in that year, for a term of fourteen years, and that she received rent from him till the time of her death.

For the real plaintiff, *Sir William Parker*, it was insisted, that he was legally entitled to the premises in question, under the will of *Sir H. J. Parker*, all the intermediate devisees being dead. The Jury found a verdict for the plaintiff, but the learned Judge reserved the point for the consideration of the Court, whether, under the above circumstances, he was entitled to recover?

Mr. *Dillon*, in person, in the last *Michaelmas* Term, had obtained a rule *nisi*, that this verdict might be set aside, and a new trial granted; and observed, that the question was, whether *Ann Parker* was tenant in fee of the premises, under the will of her brother *John*? in which case they would descend to him as her heir at law; or, whether she was tenant for life only under the will of her father Sir *H. J. Parker*? He submitted, that Sir *H. J. Parker* having accepted certain benefits devised to him by the will of his son *John*, had thereby given validity to that will, amounting to an election to take under it, and that by such election he was either divested of the reversion in fee reserved to him by the settlement of 1741, or estopped from setting up that settlement, or disputing the right of his son to dispose of the fee to his two sisters. First, Because no man can claim under and against the legal construction of the same instrument, if it be duly executed, whether it be a deed or will. Secondly, That an acceptance of benefits under any instrument, operates at law as an extinguishment of all title paramount to any of the subjects disposed of by such instrument, and estops the party by whom such acceptance is made from claiming in any adverse character. Thirdly, That a party cannot himself claim under or against the same instrument, so as not to confer similar rights on others to do so. Fourthly, That when a party, by will or deed, attempts to reduce an estate in fee to an estate for life, such deed, so far as it regards such an attempt, is not only ineffectual, but absolutely null and void. It is a well known principle in a court of equity, that he who accepts a benefit under a deed or will, must confirm the whole instrument, conformably to all its provisions, and renounce every right inconsistent with them; and here, Sir *H. J. Parker* most clearly elected to confirm his son's will in all its parts. The doctrine of election is founded on a principle of the common law. That appears from the cases of *Wil-*

1820.

 HALFORD
 v.
 DILLON.

1820.

 HALFORD
 v.
 DILLON.

son v. *Lord John Townshend* (a), and *Birmingham v. Kirwan* (b). In *Noys v. Mordaunt* (c), it was established, that where a person claims in one of two inconsistent characters, he forfeits all the rights incident to the other; nor is it sufficient that he makes compensation to those whom his election disappoints—the consequence of election is forfeiture. He also referred to *Streatfield v. Streatfield* (d), *Cowper v. Scott* (e), *Morris v. Burrows* (f), *Pugh v. Smith* (g), and *Car v. Car* (h), as to the doctrine of election with reference to the Custom of London:—*Allen v. Poultton* (i), with respect to election as to copyholds:—and *Clarke v. Guise* (k), *Villa Real v. Lord Galway* (l), *Gosling v. Warburton* (m), *Macnamara v. Jones* (n), *Blake v. Bunbury* (o), *Broome v. Monck* (p), *Thellusson v. Woodford* (q), *Whistler v. Webster* (r), and *Dougl. Duke of Devonshire v. Lord George Cavendish* (s), to shew that Sir H. J. Parker had made an election, and that, by taking the benefit of his son's will, he renounced all his rights in the estates, the assertion of which would have been inconsistent with its provisions, and that such election was conclusive on him and his representatives. Remitter is a favourite of the common law, but not so estoppel; for the latter overpowers the former.—He referred to *Littleton* (t), and *Coke's Commentaries* (u), to shew, that a person is estopped from claiming under or against the same instrument, or extinguishing the rights thereby given.—*Jenkins's Centuries* (v), *Lane's case* (x), *Coke-Littleton* (y), *Tey's case* (z), *Wete-*

(a) *Per Lord Loughborough*, 2 *Ves. jun.* 696.—(b) *Per Lord Redesdale*, 2 *School. & Lef.* 450.—(c) 2 *Vern.* 581.—(d) *Cases Temp. Talb.* 176.—(e) 3 *P. Wms.* 119.—(f) 2 *Atk.* 628.—(g) *Id.* 43.
 (h) *Id.* 278.—(i) 1 *Ves.* 121.—(k) 2 *Ves.* 617.—(l) 1 *Brown's Chan. Ca.* 292, n.—(m) *Cro. Eliz.* 128.—(n) 1 *Brown's Chan. Ca.* 481.—(o) 4 *Brown's Chan. Ca.* 21. S. C. 1 *Ves. jun.* 514.—
 (p) 10 *Ves. jun.* 597.—(q) 15 *Ves. jun.* 209, 220.—(r) 2 *Ves. jun.* 367.
 (s) 4 *Term Rep.* 741, n.—(t) *Sects.* 664, 665, 666, 667, 672, 682.—
 (u) 202 b.—(v) 252.—(x) 2 *Rep.* 17.—(y) 230 b.—
 (z) 5 *Rep.* 38.

den v. Elkington (a), *Paule v. Moodie (b)*, *Mount's case (c)*, *Hinson v. Button (d)*, *Colt v. The Bishop of Coventry and Litchfield (e)*, *Heyward's case (f)*, *Clere's case (g)*, *Ive's case (h)*, *Goodtitle, d. Edwards v. Bailey (i)*, and *The Attorney-General v. The Bishop of Litchfield (k)*, illustrate the position, that a person may lose his better title to an estate, by accepting a conveyance from another. He further submitted, that from the answer to the bill in equity, the conveyance from Sir *H. J. Parker* to his son must be presumed to have been operative, so as to pass the freehold to the latter, and insisted, that certain letters which had been written by the father of the present Sir *William Parker*, ought to have been admitted in evidence at the trial; in support of which latter position he relied on the cases of *Hagedorn v. Reid (l)*, *Hetherington v. Kemp (m)*, and *Pritt v. Fairclough (n)*.

1820.

 HALFORD
 v.
 DILLON.

Mr. Serjt. *Lens*, and Mr. Serjt. *Blosset*, in the course of the last Term, shewed cause, and submitted, in the first place, that, at all events, the letters stated to have been written by the father of Sir *W. Parker*, were not receivable in evidence against him, as he did not claim under his father, but under the devise of Sir *H. J. Parker*. Besides, the principal document attempted to be put in evidence by the defendant, as affecting the plaintiff's title, was a copy of a letter, purporting to be written by Sir *William's* father, and which was found in a large bundle of letters of that description, in the office of his attorney. The cases, therefore, of *Hagedorn v. Reid*, and *Pritt v. Fairclough*, bear no analogy to the present, as there, the copies of the letters adduced in

(a) *Dyer*, 358. *S. C. Plowden*, 580.——(b) 2 *Roll. Rep.* 131.——
 (c) *Anderson*, 3.——(d) 2 *Roll. Rep.* 158.——(e) *Hobart*, 159.——
 (f) 2 *Rep.* 35.——(g) 6 *Rep.* 17.——(h) 5 *Rep.* 11 b.——(i) *Cowp.*
 597.——(k) 5 *Ves. jun.* 831.——(l) 3 *Camp.* 379.——(m) 4 *Camp.* 193.
 (n) 3 *Camp.* 305.

1820.
 ~~~~~  
 HALFORD  
 v.  
 DILLON.

evidence related to mercantile transactions, and were regularly copied and filed by the merchants' clerks. The first stood on its own peculiar circumstances, and in the latter, it appeared that the defendant acknowledged the receipt of a letter of a particular date, which he refused to produce at the trial; and Lord *Ellenborough* held, that an entry in a letter-book, purporting to be a copy of a letter of the same date, from the plaintiff to the defendant, and inserted by a deceased clerk, who kept the book according to the course of business, and with great punctuality, was admissible evidence of the contents of the letter in question. But here, it was not even attempted to be proved that this was a true copy of the original, or that copies of any of the letters of the plaintiff's father had been regularly filed or kept in the office of his attorney.—The question as to the election of Sir *H. J. Parker* under his son's will, is purely a question of equity, and cannot operate as an estoppel in a court of law. The doctrine relative to it, was first introduced in the case of *Noys v. Mordaunt*, where it is clearly shewn that a court of law cannot entertain the question. Lord *Eldon*, in *Broome v. Monck (a)*, said, "Election is, where the testator gives what does not belong to him, but does belong to some other person, and gives that person some estate of his own; by virtue of which gift a condition is implied, either that he shall part with his own estate, or shall not take the bounty." All the cases, therefore, from *Noy v. Mordaunt* to that decision, shew, that a court of law cannot interfere in the slightest degree as to the question of election. The sections cited from *Littleton*, and Lord *Coke's Commentaries* thereon, are equally beside the present question, as the cases there put, relate to different rights to the same estate, while here, there are two distinct titles to two different estates. The case of *Gosling v. Warburton (b)*, is the exact converse of this. There, a person devised his lands to his

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(a) 10 Ves. jun. 609.——(b) Cro. Eliz. 128.

wife, until his daughter should be nineteen, then to her, in tail, remainder over in fee;—and devised further, that the daughter should, after her being nineteen, pay the wife £12 *per annum*, in recompense of her dower, and that if the daughter failed of payment, the wife should have the land for her life. The wife, before the daughter was nineteen, brought a writ of dower, and recovered her third part; and it was held, that she should not have the £12 *per annum* after the daughter was nineteen, for that the acceptance of the one was a waiver of the other. In *Goodtitle, d. Edwards v. Bailey* (a), it was held, that the lessor of the plaintiff, in ejectment, should not be permitted to defeat a solemn deed under his own hand, covenanting that the defendant should enjoy the premises, and also for further assurance; and the question there was, whether the instrument could operate as a release, or a grant of the reversion? and the Court were of opinion that it might be construed as such grant, in order to effectuate the intention of the parties. Here, however, there is no release, or other instrument by deed, and the only question is, whether a court of law will compel a party to make an election, or whether his only remedy is in equity? The legal title of the plaintiff, Sir *W. Parker*, cannot be affected by Sir *H. J. Parker's* having accepted certain benefits under the will of his son, nor can it amount to a forfeiture in law. Besides, the Master of the Rolls has expressly decided, that the circumstances, as stated in this case, do not amount to an election in equity (b). In *Doe, d. The Duke of Devonshire v. Lord George Cavendish* (c); the doctrine as to election was carried by Lord *Mansfield* to too great an extent. His Lordship seems to have founded his decision on three grounds. First, that the parties could not dispute the will, or whether the

1820.  
 HALFORD  
 v.  
 DILLON.

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(a) *Cowp.* 597.——(b) *Dillon v. Parker*, 1 *Swanston*, 359. S. C. 2 *Wilson's Rep. in Chanc.* 263.——(c) 4 *Term Rep.* 741, n.



1820.  
  
 HALFORD  
 v.  
 DILLON.

appointment under it was made legally or illegally; and on that point his Lordship observed, that the plaintiffs were tenants in tail under the will of Lady *B.* and tenants for life under the Duke of *B.*; that they claimed great property under the Duke's will, and have taken it. If they reject his will, they must renounce all benefit under it; but, he added, that they were therefore bound to suffer a recovery, or make the title complete. He therefore considered, that the obligation on the party to suffer a recovery, was equivalent to a recovery actually suffered. The second and third grounds were, that the appointment was good, and that the power was well executed, or at all events, to such an extent as to give the defendant an estate for life. There too, as well as in *Goodtitle*, d. *Edwards v. Bailey*, the action of ejectment was considered as fictitious; but it has since been invariably held, that the lessor of a plaintiff in that action can only recover on a legal title. The general rule as to election in a court of equity is laid down by Lord *Eldon*, in *Broome v. Monck* (a), and by Lord Commissioner *Eyre*, in *Blake v. Bunbury* (b), where he observed, that "it is the settled doctrine of a court of equity, and agreed on all sides, that no man shall be allowed to disappoint a will under which he takes a benefit. To put the strongest instance at once, if a man takes upon himself to devise to *B.* lands to which he has no colour of title, and which are in the possession, or are the inheritance of *A.* to whom some part of the testator's estate, real or personal, is also devised, *A.* must either renounce to the extent of his own estate, the estate devised, or must convey his own estate to *B.*" How, therefore, is a court of law to ascertain the value or extent of an estate? And his Lordship there added, that "putting a devisee to his election, however reasonable and just it might

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(a) 10 Ves. jun. 609. — (b) 1 Ves. jun. 523. S. C. 4 Brox's Chan. Ca. 24.

HALFORD  
C.  
DILLON.

by, viz. that the testator intended to dispose of his property—  
 that the testator intended to dispose of his property—  
 or was obliged to do so, or was obliged to do so, or was  
 assumed. In *The Masson v. Woodford* (a), Lord Eldon said,  
 that “if a testator, intending to dispose of his property, and  
 making all his arrangement under the impression, that he has  
 the power to dispose of all, that is the subject of his will,  
 mixes in his disposition, property that belongs to another  
 person, or property, as to which another person has a right  
 to defeat his disposition, giving to that person an interest  
 by his will, that person shall not be permitted to defeat the  
 disposition, where it is in his power, and yet take under the  
 will. The reason is, the implied condition, that he shall not  
 take both, and the consequence follows, that there must be  
 an election; for though the mistake of a testator cannot af-  
 fect the property of another person, yet that person shall  
 not take the testator’s property, unless in the manner intended  
 by the testator.” The doctrine of election, therefore, has  
 never been put on the footing of estoppel or forfeiture. The  
 cases of election at law are those where a deed may enure  
 in different ways, so that the grantee shall have his election  
 how to take, namely, either by demise at the common  
 law, or by bargain and sale, as in *Heyward’s case* (b). The  
 cases as to election, according to the custom of *London*, or  
 in respect of copyholds, are wholly beside the present ques-  
 tion, as they are referable only to the jurisdiction of a court  
 of equity, and consequently there is no ground whatever for  
 the defendant’s application for a new trial.

Mr. *Dillon*, in support of his rule, observed, that the  
 first question was, whether Sir *H. J. Parker* took any in-  
 terest under his son’s will, and if so, what interest, and  
 whether he had not reduced it into possession. Secondly,

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(a) 13 Ves. jun. 220.—(b) 2 Rep. 35 b.

1820.  
  
 HALFORD  
 v.  
 DILLON.

If he had taken such interest, whether it was waived by his son's death in his life-time. Thirdly, Whether Sir *H. J. Parker*, by his will, intended to devise the *Talton* estate in opposition to the will of his son. And lastly, Whether, independently of the acts of Sir *H. J. Parker*, Sir *William Parker* was not estopped from disputing his (*Dillon's*) title. The case of *Birmingham v. Kirwan* (a), clearly shews, that he is concluded from so doing; and Lord *Redesdale* there said (b), "the rule of election I take to be a rule of law, as well as of equity; and the principal reason why courts of equity are more frequently called upon to consider the subject (particularly as to wills) than courts of law, I apprehend is, that at law, in consequence of the forms of proceeding, the party cannot be put to elect; for, in order to enable a court of law to apply the principle, the party must either be deemed concluded, being bound by the nature of the instrument, or must have acted upon it in such a manner as to be deemed concluded by what he has done; that is, to have elected." In *The Attorney-General v. The Bishop of Litchfield* (c), the question was, in whom the legal estate was vested; and Lord *Eldon* there said (d), that "a conveyance from the heir, though it does not operate as a conveyance, is an estoppel to the heir, and being an estoppel to the heir, all the world is estopped, and a complete title is gained." So the cases of *Palmer v. Ekins* (e), and *Trevivan v. Lawrence* (f), clearly shew, that where an estoppel works on the interest of the lands, it runs with them into whose hands soever the lands come. Lord *Kenyon*, in the case of *Hayne v. Maltby* (g), said, that where an heir apparent, having only the hope of succession, conveys, during the life of his ancestor, an estate which afterwards descends upon him,

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(a) 2 School. & Lef. 444. — (b) *Id.* 450. — (c) 5 Ves. jun. 825. —  
 (d) *Id.* 831. — (e) 2 Lord Raym. 1350. S. C. 2 Str. 818. —  
 (f) 1 Salt. 276. — (g) 3 Term Rep. 441.

although nothing passes at that time, yet, when the inheritance descends upon him, he is estopped to say, that he had no interest at the time of the grant—there an estoppel is founded on law, conscience, and justice. In *Plada's* case (a), it was held, that if a father and son be joint tenants for eighty years, and afterwards the father let the lands to the son for fifty years, by indenture, upon condition, that if the father paid £20 on such a day, the lease should be void; and the condition was performed, and the father entered, and devised the lands to two other of his sons, and died, it was held, that the son who took the lease was estopped to claim any other estate than for fifty years, and that the estoppel continued after the fifty years expired. In *James v. Landon* (b), it was determined, that in estoppels, both parties are to be estopped. The decision of the Court of *King's Bench* in *Doe, d. Duke of Devonshire v. Lord Cavendish*, was founded on established and well-known principles of law. Here, too, it must be presumed, that a conveyance was in fact made from Sir *H. J. Parker* to his son, by which the freehold would pass to him under the agreement which was executed between them—for it was not only an executory agreement, but a specific sum was paid down by way of consideration. Such a conveyance must be presumed, after so long a time has elapsed; for in *Warren, d. Webb v. Greenville* (c), it was held, that a surrender of a tenant for life should be presumed on a recovery of forty years standing; and although an entry in an attorney's debt book was read, after his death, to prove it, the Court declared that they would have presumed a surrender without that circumstance, as they did not require any evidence to fortify the presumption, after such a length of time. In *Goodtitle, d. Parker v. Baldwin* (d), it was held, that a possession of Crown land, commencing fifty-five

1820.

HALFORD  
v.  
DILLON.

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(a) Cited *Cro. Eliz.* 36. — (b) *Cro. Eliz.* 37. — (c) 2 *Str.* 1129.  
(d) 11 *East*, 488.

1820.  
  
 MALFORD  
 v.  
 DILLON.

years ago, by encroachment on the Crown in the time of the lessor of the plaintiff's father, maintained by the father till his death, nineteen years ago, and afterwards continued for two years by his widow, when the defendant obtained the possession, would be sufficient evidence from the Crown to the lessor's father, if the Crown were capable of making such a grant; and Lord *Ellenborough* there said (a), that "with respect to the general impossibility of presuming a grant against the Crown, the Courts were in the daily habit of presuming grants from the Crown, as of markets, and the like, upon an uninterrupted enjoyment of twenty years." The cases of *Doe, d. Howell v. Lloyd* (b), *England, d. Sybourn v. Slade* (c), and *Doe, d. Bowerman v. Sybourn* (d), establish the principle, that on outstanding terms, where it is in proof on the part of the plaintiff, that the trusts on which such terms were created, have been completely fulfilled, so that the trustees ought to have conveyed, the Jury will be directed to presume, that, in point of fact, they have done so, though there is no direct evidence of the fact. Besides, here, it is quite clear, that the freehold passed to the son by the conveyance, subject only to a condition whereby Sir *H. J. Parker* was to be entitled to enter, in the event of his surviving his son, in which case it could not be presumed that the former had made an entry to enforce the condition broken. In *Littleton* (e) it is said, that in cases of feoffment upon condition, where the feoffor may lawfully enter for the condition broken, he hath not the freehold before his entry. He also referred to *Coke's Commentary* (f), as to a distinction between a condition that required a re-entry, and a limitation that *ipso facto* determined the estate without any entry:—and to *Coke-Littleton* (g), to shew the distinction between the com-

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(a) 11 *East*, 491.——(b) *Peake's Evidence*, 4th edit. Append. page 91.——(c) 4 *Term Rep.* 683.——(d) 7 *Term Rep.* 2.——(e) *Sect.* 351.——(f) 214 b.——(g) 315 b.

mon law and the statute 32 Hen. 8. c. 34. In order to shew that the doctrine of estoppel formed an exception to that of remitter, he cited *Littleton* (a), and *Coke's Commentary* thereon (b). He also referred to *Coke-Littleton* (c), as to the legal definition of the word "title." Further, in *Coke-Littleton* (d), it is said, that "regularly, when any man will take advantage of a condition, if he may enter he must enter, and when he cannot enter, he must make a claim; and the reason is, for that a freehold and inheritance shall not cease without entry or claim, and also the feoffor or grantor may waive the condition at his pleasure." So, in *Jenkins's Centuries* (e), although there may be a waiver of re-entry in matter of *pais*, still such entry must be of a decisive nature, and is the only remedy at law to take advantage of a condition. In *Coleburn v. Mixstone* (f), it was determined, that where a testator demised several houses, an entry into one of them was sufficient for the whole, and that the entry should be adjudged most beneficial to the devisee. It further appears, that the doctrine of election is founded on a proceeding at common law; for, in the *Doctor and Student* (g), it is asked, whether a prelate may refuse a legacy? and it was answered, that he might, for that the legacy was not perfect until he to whom it was made assented to take it, but that if he intended to refuse, he must, as soon as his title by the legacy falleth, relinquish to take the profits of the thing bequeathed; for if one take the profits thereof, he shall not afterwards refuse the legacy. According to all these authorities, therefore, it is quite clear, that Sir H. J. Parker had elected to abide altogether by his son's will, and that by such election he was estopped from controverting the right of his son to

1890.  
HALFORD  
v.  
DILLON.

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(a) Sect. 659. — (b) 347 b. 348 a. — (c) 346 b. —  
(d) 218 a. — (e) Page 42. — (f) 1 Leonard, 129. — (g) Dial. 2.  
c. 33. page 206. 18th edit.

1820.

HALFORD  
v.  
DILLON.

dispose of the fee. Secondly, That there was sufficient ground for the Jury to presume, that a conveyance of the reversion in fee had been made by Sir *H. J. Parker* to his son, under the terms of the agreement between them, in the year 1766. And lastly, That the letters of the father of the present Sir *William Parker* ought to have been admitted in evidence at the trial.

*Cur. adv. vult.*

On this day, Lord Chief Justice DALLAS, after briefly stating the pleadings, and the facts of the case, and observing, that unless Sir *H. J. Parker* had done some act to deprive himself of the reversion in fee, retained to him by the settlement of 1741;—he having survived his only son, had power to dispose by his will of the reversion in fee—and that Sir *William Parker*, having insisted that all the intermediate parties being dead, he was now entitled to the premises in question, under the will of Sir *H. J. Parker*, said, that it had been contended, however, by the defendant Mr. *Dillon*, that Sir *H. J. Parker* had no power to dispose, by his will, of the *Talton* estate, he being, as was insisted, at the time of making his will, seised for life only of that estate—and this was contended by him on two grounds:—

First, That Sir *H. J. Parker* having accepted certain benefits devised to him by the will of his son *John Parker*, which *John Parker* had taken upon himself by the same will, to devise the *Talton* estate to his father for life, with remainder to his sisters of the half-blood, *Margaret* and *Ann Parker*, in fee, had thereby elected to abide by, and confirm his son's will in all parts; and that, by such acceptance and election, he was either actually divested of the reversion in fee reserved to him by the settlement of 1741, or else, that he, and all persons claiming under him, were estopped from setting up that settlement, or otherwise con-

troverting the right of *John Parker* to dispose of the fee of that estate to his two sisters.

1820.  
  
 HALFORD  
 v.  
 DILLON,

Secondly, That the Jury ought to have been directed to presume that some conveyance of the reversion in fee had been made by Sir *H. J. Parker* to his son *John Parker*.

On the first point, many equity cases respecting election, from *Noys v. Mordaunt* (a), to *Broome v. Monk* (b), were cited, from which it was argued, that the doctrine of election is a doctrine of the common law, and borrowed from thence by courts of equity; and that although the interposition of a court of equity may, in certain cases, be necessary to compel a party to elect, yet, that when he has made his election to take under the will, and has accepted the benefits thereby given to him (as was argued to be the case here), the aid of such a court was not necessary to divest him of any property which he held, in repugnance to the will, but that, in such case, he was *ipso facto* divested or estopped by the operation of the common law.

It was further argued, that at the common law, a man may be estopped, not only by record or deed, but also by matter *in pais*, as by the acceptance of an estate; and the Court was referred to *Littleton's* chapter on Remitter (c), with Lord Coke's Commentary thereon, and to other authorities respecting the surrender of an old, by the acceptance of a new lease, for the purpose of shewing, that a man may lose his older and better title to an estate, by accepting a conveyance from another.

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(a) 2 Vern. 581. — (b) 10 Ves. jun. 597. — (c) Litt. sect. 667, and Co. Litt. *ibid*.



1820.  
  
 HALFORD  
 v.  
 DILLON.

And, finally, the Court was pressed with the authorities of two more modern cases, *Goodtitle, d. Edwards v. Bailey (a)*, and *Doe, d. Duke of Devonshire v. Lord George Cavendish (b)*.

As to the cases in equity, it appears to us, that the principle of them is entirely a principle of equity, proceeding on the doctrine of an implied condition, of which a court of equity will enforce the performance, viz. by compelling the devisee, if he elects to take the benefit of the devise, to convey over his original estate, so that it may pass in conformity to the will.

These cases seem to us to afford no authority shewing what the effect of such election is at the common law, and without the aid of a court of equity.

As to the doctrine of estoppel, which forms an exception in certain cases to the doctrine of remitter (as in the instance put by *Littleton (c)*, where tenant in tail enfeoffs his heir of full age, who enters, and survives his father, and is thereby estopped from claiming the estate tail *per formam doni*;—and also; as to the doctrine of surrender of a lease by the acceptance of a new one;—as, when a man, having a lease for twenty years, accepts from the same lessor a new lease for ten years, and is thereby estopped from claiming his old lease for twenty years:—All these, are cases of two titles to the same lands, where a man, by accepting a new and inconsistent title, is precluded from setting up his older and better title to the same lands. It is obvious, that these cases fall very short of proving the point now contended for, and indeed have no application to it, the point being this, that a

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(a) E. 17 Geo. 3. Corp. 597. — (b) H. 22 Geo. 3. 4 Term Rep. 741, n. (c) Sect. 664.

man, by accepting a title to *Black Acre*, is thereby divested or estopped from setting up his former title to *White Acre*.

1820.

HALFORD  
v.  
DILLON.

As to the cases of *Goodtitle v. Bailey* and *Doe v. Lord George Cavendish*—in the first, the Court thought that the release might well be construed as a grant of the reversion, which alone was sufficient to sustain the nonsuit; and, in the second, that the power was well executed *in toto*, or, at all events, to the extent of giving to Lord George Cavendish an estate for life;—in either of which cases, the lessor of the plaintiff could have no right to recover. It is true, that the Court, in the reports of those cases, appears to have thrown out more than was necessary for the decision, and more than perhaps is consistent with the strict legal view in which the action of ejectment is now regarded. These cases occurred at a time when that action was considered as a fictitious action, in which a different sort of title would suffice than what is required in a real action, and when it was thought that an equitable title would be sufficient to support or to defend an action of ejectment, contrary to the legal right of possession.

That the Court, in these cases, had in view the equitable title which was then thought sufficient in ejectment, and not the strict legal title, is manifest, from what Lord Mansfield is reported to have said, in considering the doctrine of election, in *Doe v. Lord George Cavendish*, viz. "They, (namely, the late Duke's children) claim great property under the Duke's will, and have taken it. If they reject his will, they must renounce all benefit under it; therefore they are bound to suffer a recovery, or make the title complete." His Lordship seems to consider that the obligation on the party to suffer a recovery, and complete the title, is, for the purpose of an ejectment, equivalent to a recovery actually suffered, and the title completed.

1820.  
HALFORD  
v.  
DILLON.

But this doctrine has been over-ruled by the cases of *Doe, d. Hodsden v. Staple (a)*, *Goodtitle, d. Jones v. Jones (b)*, and *Doe, d. Da Costa v. Wharton (c)*, and by the constant practice of courts of common law for these last thirty years.

As to the second point contended for by Mr. *Dillon*, namely, that the Jury ought to have been directed to presume that some conveyance of the reversion in fee had been made by Sir *H. J. Parker* to his son *John Parker*, Mr. *Dillon* read in evidence at the trial, the answer of Sir *William Parker* to a bill in equity filed against him by Mr. *Dillon*, in which answer, Sir *William Parker* admits, that he believes that certain articles of agreement between Sir *H. J. Parker* and his son *John Parker*, were made, in the year 1766, whereby the said *John Parker* agreed to pay £700, and also an annuity of £200 *per annum* to his father; and his father, in consideration thereof, agreed to convey the *Talton* estate immediately to his son, subject to a proviso, that if the son should die in the life-time of the father, the said conveyance was to be wholly void.

Mr. *Dillon*, from this admission, argued, not only that it is to be presumed that such a conveyance was in fact made, but that it must be presumed to have been a conveyance operating according to the common law, whereby the freehold would pass to the son, subject only to a condition, whereby the father was to be entitled to enter in the event of his surviving his son; and if so, then Mr. *Dillon* further argued, that it could not be presumed that the father had made an entry to enforce the condition broken.

To this argument it appears to us that a short answer may be given. If it is to be presumed that any convey-

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(a) 2 Term Rep. 681.—(b) 7 Term Rep. 47.—(c) 8 Term Rep. 2.

ance was in part executed, it should be presumed that it was such a conveyance as would best effectuate the intention of the parties. Now, the intention clearly was, that in the event, which has happened, of the father surviving the son, the conveyance was to be wholly void; and this intention might have been effectuated by a conveyance operating under the statute of uses, whereby, in the event contemplated, the use would have been re-vested in the father, without the necessity of any entry.

1820.  
HALFORD  
v.  
DILLON,

On this short ground, therefore, without considering others, we think no such conveyance can be presumed as would enable the son to dispose of the fee by his will.

Another question was made by Mr. *Dillon*, viz. whether certain letters, written by Sir *William Parker*, the father of the present Sir *William Parker*, ought not to have been admitted in evidence?

On this point, it is sufficient to say, that it does not appear to us, that the present Sir *William Parker* claims under the late Sir *William Parker*, and therefore we think that the letters of the former cannot be evidence to affect the title of the latter.

On all these grounds, we are of opinion that the rule for the new trial must be

Discharged.

1820.

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DRAKE

v.

ROGERS.

paid at or before the sealing and delivery of the deeds, and it was held, that it sufficiently imported that such money was actually received by the grantor, through the medium of the grantee's draft, before the execution of the deeds granting the annuity, so as to dispense with the necessity of setting out in the memorial the particulars of such draft, with the time of payment. But here, the consideration is expressed to have been paid by the plaintiff immediately before the execution of the indenture, which is much stronger, as it was there doubtful whether the draft was even given at the time the deeds were executed. Here too, after the parties have lain dormant during twelve years, and the annuity has been regularly paid during that period, it cannot now be inferred that the check mentioned in the memorial was not converted into cash, or paid at the time the deeds were executed, and more particularly so, as the receipt by the defendant *Rogers* did not refer to the check alone, but to the payment of the whole of the consideration-money; and in *Ex parte Michell (a)*, it was held, that a memorial, stating the whole consideration to be paid in money, was good, though part of it was paid by a banker's check, the value of which had been received by the grantor before the execution of the deeds.

Mr. Serjt. *Blosset*, in support of the rule. The case of *Ex parte Maxwell* is easily distinguishable from the present. Here, the consideration-money was only £150, for which it appears the plaintiff has received annually £25 for nearly twelve successive years, which is double the amount of the principal sum advanced; but the principal objection is, that the time when the check was payable, was not set forth in the memorial. As to the construction of the receipt for the consideration-money given by the defendant *Rogers*, it refers

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(a) 2 East, 137.

to a draft payable at a bankers. The word "payable" in itself imports, that it was to be paid at a future day. That therefore distinguishes the present case from those of *Berry v. Bentley* and *Rumball v. Murray*, for there it was stated, that the notes which formed the consideration-money had been paid. The defendants, therefore, in the memorial in this case merely acknowledged the receipt of a draft, but it was not stated either when it was payable, or whether in fact it had been paid or not. Although Lord Chief Justice Eyre, in *Morris v. Wall*, expressed his disapprobation of the cases of *Rumball v. Murray* and *Berry v. Bentley*, still the Court decided that they were bound to act in conformity to these two cases. If it could be deemed sufficient to state, as in this case, that the consideration was paid partly in bank notes, and partly by a draft, payable at a bankers, a door would be opened to frauds of every description, as it is very probable that such bankers might have no effects of the drawers in their hands at the time the draft was given, or it might be payable at a very distant period, in which case it would be minus the sum therein stated, by reason of the discount, or perhaps eventually it might not be paid at all. In *Ex parte Maxwell* the consideration was stated to have been paid on the day of executing the deeds, and Lord Kenyon there founded his opinion, on no objections having been taken to the annuity sooner, and he does not at all impeach the consideration as set out in the memorial. So, *Ex parte Michell*, merely shows that if part of the consideration be paid by means of a check the value of which had been actually received by the grantors before the execution of the deeds, the memorial stating the whole consideration to have been in money, is good. *O'Callaghan v. Ingilby*, as well as the other cases relied on for the plaintiff, are wholly inapplicable to the present. In the former, it appears that the consideration-money had been actually received by the grantors before the execution of the deeds. This case must therefore be governed by those of *Rumball*

1820.  
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 DRAKE
 v.
 ROBERTS.

1820.

DRAKE

v.

ROGERS.

v. Murray, Berry v. Bentley, and Poole v. Cabanes, and the rule must consequently be made absolute.

Lord Chief Justice DALLAS.—This objection ought not to be encouraged. The grantors, nearly twelve years after the annuity was granted, and after the death of both the witnesses attesting the execution of the deeds at the time the consideration was paid, now think fit, for the first time, to raise an objection to such consideration as it is set forth in the memorial. It is no ground for setting aside the securities to say, that the grantee has received double the principal sum advanced;—for an annuity is granted on a contingency; viz. the lives of the parties, and if the grantors had died within the first year after it had been granted, the grantee would have lost all the benefit that might have accrued to him from the annual payments to be made him in consideration of the principal sum so advanced. This case may be considered on two grounds, first, on principle, and, secondly, on authorities. It is now too late to lament the effect of previous decisions; and although Lord Chief Justice Eyre, in *Morris v. Wall*, regretted the determinations of the Court of King's Bench, in *Rumball v. Murray*, and *Berry v. Bentley*, still the rule there laid down was adopted by him, and has since been clearly recognised as law. But the principal if not the sole objection, in this case is, that the memorial does not set forth when a draft, which was part of the consideration, and made payable at a bankers, was payable, or whether in fact it was ever converted into cash, or paid to the grantors, so that in point of fact it is uncertain whether they ever received the whole of the consideration for the annuity or not. Independently of decisions, even in point of principle, there is an obvious reason why it should appear on the face of the memorial when the draft was payable, and that reason is given in *Berry v. Bentley*. There, the memorial stated, that the consideration, which was £700, was paid by a promissory note, and the objection was, that it did not set forth

when the note was payable, whether immediately or at a distant day; for, if at a distant day, it was not worth £700, by reason of the discount;—the same objection might be made to the draft in question, as it might be payable at a distant day, in which case, the grantors might have been put to the loss of part of the consideration, by getting it discounted. In substance, and on principle, therefore, it appears to me there is a sufficient ground that the time at which the draft became payable should have been specified on the face of the memorial. Before, however, I advert to the principal cases which have been decided on this subject, I will briefly refer to the terms of the memorial, which stated, that “in consideration of £85, in Bank of *England* notes, payable on demand, and also £65, by a draft, bearing even date therewith, drawn by *Moore* on, and payable at *Birch* and *Co.* bankers, to the defendant *Rogers* (with the privity and consent of the co-defendant), paid by the plaintiff immediately before the execution of the indenture, the receipt whereof the defendant *Rogers* duly acknowledged.” He thereby merely acknowledged that he had received £85 in Bank of *England* notes, and a draft for £65, and not that he had received any money for the draft. That leaves the objection precisely where it was, namely, whether by principle, and on decided cases, it is necessary that the memorial should express the time when the draft was payable. The case of *Berry v. Bentley* decided, that if the consideration be paid by a promissory note, or a banker’s check, the time when it becomes payable must be set forth in the memorial; that case is stronger than the present, for there it was stated, that the sum secured by the check had been since paid. *Poole v. Cubanes* (a) is still stronger, for there the consideration was stated in the memorial to be £210, £199:10s. of which was paid by a draft, which was duly honored, and the remaining sum of £10:10s. in lawful

1820.

DRAKE
v.
ROGERS

(a) 8 Term Rep. 328.

1820.

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 DRAKE
 v.
 ROGERS.

money. Here, however, it is not stated whether the draft was paid or not; one objection in that case was, that the consideration was not sufficiently stated in the memorial, and in answer to that an affidavit was produced, stating, that the annuity had been regularly paid from *February, 1792, to December, 1798*, and that the party who drew the draft was dead; and it was insisted that it ought not to be permitted to the defendants, who had lain by during the whole of the drawer's life-time, to make these objections to the annuity, when the only person who could answer the facts was dead; when it was observed, in support of the objection, that the insufficiency of the statement of the consideration appeared on the memorial itself, where it was stated that part of the money was paid by a banker's check, without setting forth the time when it was payable, and *Berry v. Bentley* was relied on. To this it was answered, that there the money was paid by a promissory note; whereas, in *Poole v. Cabanes*, it was paid by a banker's check, which was always considered as money. But the Court thought that that circumstance was immaterial, and consequently decided that it was necessary to state when the check was payable, according to the former case of *Berry v. Bentley*. On the authority of these two cases, therefore, as well as on reason and principle, I am of opinion that it was necessary to state the time when the draft became payable on the face of the memorial. As, however, the case of *O'Callaghan v. Ingilby (a)*, has been relied on, it is necessary to look at the facts of that case, as well as the principles on which it was decided; in order to ascertain whether the former cases of *Berry v. Bentley* and *Poole v. Cabanes*, were thereby impugned or commented on.

Cur. adv. vult.

The Court, on this day, were unanimously of opinion that the time when the draft became payable should have been

(a) 9 East, 135.

stated in the memorial;—but they imposed on the defendants the terms of their agreeing to return the principal, on taking an account before the prothonotary, as was done in the case of *Peole v. Cabanes*, and subject to these terms, the

1820.

DRAKE
v.
ROGERS.

Rule was made absolute.

LINGHAM v. WARREN and Another, Executor
and Executrix.

Saturday,
May 6.

THIS was an action of replevin for taking the plaintiff's goods and furniture. The defendants avowed as executor and executrix of one *Hutchinson* deceased; that the plaintiff held the dwelling-house, in which, &c. as tenant thereof, to *Hutchinson* in his life-time, and from his death until the time when, &c. as tenant to the defendants as executor and executrix, under and by virtue of a demise made to the plaintiff in the life-time of *Hutchinson*, at and under the yearly rent of £160, payable quarterly, and that because a year's rent was due from the plaintiff to *Hutchinson* in his life-time, and to the defendants as his executor and executrix, from the time of his death, until and at the said time when, &c. they well avowed the taking of the said goods, &c. in the said dwelling-house, in which, &c. and justly, &c. as a distress for the said rent so due and in arrear as aforesaid, and which said rent still remained so due and in arrear as aforesaid, to the said defendants as executor and executrix. Plea in bar, that the defendants, as such executor and executrix, ought not to avow the taking of the said goods, because *Hutchinson*, in his life-time, took and distrained as a distress for the same identical rent in the avowry mentioned, divers goods and chattels of the plaintiff of sufficient value to satisfy and dis-

To an avowry by executors for rent due in the life-time of their testator, a plea in bar that the testator took as a distress for the same rent goods of sufficient value to satisfy such rent, and the costs of taking the distress, is insufficient, as it should have shewn that such distress produced a satisfaction of the rent.

1820.
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 LINGHAM  
 v.  
 WARREN.

charge the rent in the avowry mentioned, and therein supposed to be due and in arrear and unpaid to the defendants as executor and executrix, and the costs of taking and keeping the said distress; and this, &c.; wherefore, &c. To this plea in bar the defendants demurred generally, and the plaintiff joined in demurrer.

The case came on for argument this day, when

Mr. Serjt. *Vaughan*, in support of the demurrer, submitted, that the plea in bar was no answer to the defendants avowry, as it did not appear that the distress taken by their testator was satisfied, or that the amount of the rent under it was actually recovered. It is true, that although he might have distrained, still the distress having been replevied, the action might have abated by his death. This case, however, must be governed by that of *Lear v. Edmonds* (a), where, in an action for use and occupation, a plea of a previous distress for the same rent was held bad, for not shewing that the rent was also satisfied.

Mr. Serjt. *Lawes*, *contra*. That case is distinguishable, as it was an action of debt for use and occupation, and it was no answer to an action of that description to plead that the landlord had before distrained, unless the plea further stated that such distress had been satisfied; for the mere taking a distress does not amount to an absolute extinguishment of the debt. Nothing, therefore, but an actual satisfaction could be there sufficient. But here the plaintiff has pleaded that the first distress was of sufficient value to satisfy the rent, as well as the costs of taking and keeping such distress. The question therefore is not whether the rent has been paid, but whether if one distress be taken by a lessor, his executors can proceed to take another after his death for the same rent? This may be assimilated to an action of trespass, as the plaintiff sustained an

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(a) 1 Barn. & Ald. 157.

injury by the seizure of his goods in the first instance ; and the rule is, that where a landlord has once taken a distress co-extensive with the rent due, he cannot take a second distress for the same rent. Previously to the passing of the stat. 17 Car. 2. c. 7, even if a landlord took an insufficient distress for rent, he could not distrain a second time, but must be driven to his action ; but the fourth section of that statute (a) provided for that mischief. Independently of this, however, the avowry is insufficient, as it is made by executors for rent due from the plaintiff in the life-time of their testator, and it is quite clear they could not distrain as such by the common law, nor does it appear they were entitled to do so under 32 Hen. 8. c. 37.

1820.

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 LINGHAM.  
 v.  
 WARREN.

Mr. Serjt. *Vaughan* in reply. The cases of *Meriton v. Gilbee* (b), and *Martin v. Burton* (c), have decided, that in an avowry under that statute by an executor, it is immaterial to set out the title, or shew the interest of the testator ; and as it is averred that the rent was due to him, the holding might be rejected as surplusage, as the avowry would be complete without it, and as the plea in bar does not shew that the distress was satisfied, the defendants are entitled to judgment.

Lord Chief Justice DALLAS.—This case appears to me to be undistinguishable from that of *Lear v. Edmonds*. If the goods had been illegally taken in the first instance, the plaintiff might have brought an action of trespass, but having pleaded that the testator had previously distrained for the same rent, he should have shewn that such distress amount-

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(a) By which it was enacted, that " where the value of cattle distrained should not be found to amount to the full value of the arrears distrained for, the party to whom such arrears are due, his executors, &c. may, from time to time, distrain again for the residue of such arrears."

(b) *Ante*, vol. ii. page 48. — (c) *Ante*, vol. iii. page 608.

1820.  
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 LINGHAM
 v.
 WARREN.

ed to satisfaction, for there may be numerous instances where the merely taking a sufficient distress might not be productive of the satisfaction of the rent due. The objection raised to the form of the avowry amounts to nothing, as the defendants have avowed that rent was due to them as executors, part of which accrued to the testator in his life-time, and part after his death.

Mr. Justice BURROUGH concurred.

Mr. Justice RICHARDSON.—The stat. 17 Car. 2. c. 7, supposes the first distress to be still in force, for there cannot be two concurrent distresses. The avowry, is good on the face of it, as it is therein alleged that rent was due from the plaintiff to the testator, as well as to the defendants as his executors. That, therefore, was sufficient to give them a chattel interest, and their testator must be presumed to have an estate in fee until the contrary appears, and it was not incumbent on them to set forth his interest in the avowry. The answer to it by the plaintiff in his plea in bar is merely that the testator levied a sufficient distress for the same rent; that alone is insufficient, for he ought to have answered the avowry *in toto*, and shewn that the rent was fully satisfied by such distress.

Judgment for the avowants.

1829.

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## CHITTY and Another v. BISHOP.

Monday,  
May 8.

Mr. Serjt. *Laves*, on a former day in this Term, having obtained a rule nisi, that the proceedings in this cause might be stayed, on the ground that the action was brought without the knowledge or consent of one of the plaintiffs, and it appearing that the same motion had been previously made before Mr. Justice *Barrough*, at Chambers, and cause there shown, on affidavits, but that he directed the motion to be made in Court,

In shewing cause against a rule which had been previously before a Judge at Chambers, the same affidavits cannot be used, unless they are re-sworn and re-stamped.

Mr. Serjt. *Vaughan* now, on shewing cause, offered the same affidavits which had been before used at the learned Judge's Chambers, to which

Mr. Serjt. *Laves* objected, and submitted, that they could not be read in shewing cause against this rule, although they had been re-sworn, as they had fulfilled the object for which they had been originally intended, and therefore that a new stamp was requisite on each, as perjury could not be assigned on them, for want of sufficient stamps to enable them to be given in evidence, as the original jurat had performed its office, and no stamp whatever was affixed to the second.

The Court held the objection fatal, and accordingly ordered them to be re-stamped (a).

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(a) By the 55 Geo. 3. c. 184, Sched. part 2, "Every affidavit to be filed, read, or used, in any of the courts of law or equity at Westminster, or before any Judge, or other officer of any of the said courts," and the copy of such affidavits are subject to the stamp duty of 2s. 6d., and it has been held, that two separate affidavits require separate stamps, although they are contained on the same paper. See 1 Tidd, 7th edit. p. 517. 1 Chitt. Rep. 452, n.

1820.

Tuesday,  
May 9.

## BRIGGS v. DIXON.

The Court will not discharge a rule obtained by a defendant for a Special Jury, where no delay appears, nor will it be presumed to have been obtained for delay, although the defendant acknowledged the debt, and it was sworn that it was believed he had no defence to the action.

Mr. Serjt. *Peake*, on a former day in this Term, had obtained a rule *nisi*, that the rule for a Special Jury, which had been obtained by the defendant in this cause, should be discharged, on affidavits, which stated, that the defendant's agent purchased goods of the plaintiff to the amount of £61, and that he drew bills to that amount, which the defendant accepted, but which being dishonored, the present action was brought against him on his acceptances; that the defendant admitted he was indebted to the plaintiff in the amount of the bills, and offered to pay him ten shillings in the pound; and it was further stated, that the deponents believed he had no defence to the action.

Mr. Serjt. *Hullock*, *contra*, relied on the case of *Bloxam v. Brown* (a), where this Court would not discharge a rule for a Special Jury, where it had been regularly obtained, but that, where delay was suggested as the motive for obtaining the Special Jury, and not satisfactorily denied, the Court would direct the cause to be tried at the Sittings in Term, unless such terms were offered as would obviate the objection.

Lord Chief Justice DALLAS.—The practice of this Court differs from that of the *King's Bench*, as to obtaining a rule for a Special Jury. In the latter, where such rule has been obtained for the purpose of delay, it is usual to move the Court, on an affidavit of the circumstances, for a rule to shew cause why the rule should not be dis-

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(a) 4 Term. 470.

charged, which that Court will make absolute, on an affidavit of service, unless good cause be shewn to the contrary. But here, where delay is suggested, the Court will not discharge the rule, but direct the cause to be tried within the Term. The rule, therefore, that has been obtained by the defendant cannot be discharged. Besides, it has not been suggested by the plaintiff, that delay was the motive for the defendant's application: if it had, perhaps he might have satisfactorily answered it. The Court, therefore, will not interfere, and the present rule must be

1820.

BRIGGS  
v.  
DIXON.

Discharged (a).

(a) See all the cases on this subject collected in 2 *Tidd*. 7th edit. 829.

HALE v. SMALL and Others.

Wednesday,  
May 10.

THIS was an action of trespass brought against the defendants, for breaking and entering the plaintiff's closes and dwelling-house, and taking his cattle and furniture.—Plea, Not Guilty.—There had been two previous trials in this cause, which, as well as the present, were instituted for the purpose of trying the validity of a commission of bankrupt, which had been issued against the plaintiff, and in

Where a commission of bankrupt issued against a trader, describing him as "a dealer in cattle, and seeking his trade of living by buying and selling," without the words "dealer and

chapman;" and at the trial of an action of trespass brought by him against the assignees under the commission, evidence was received of a dealing in hops, and a verdict was found for the defendants, as such assignees, which was afterwards set aside, and a new trial granted, on the ground, that it might operate as a surprise on the plaintiff:—Held, on a second trial, that such evidence was properly admitted, as the words "dealer in cattle," were descriptive of the person only, and that the general statement, that the bankrupt got his living by "buying and selling," was sufficient to admit evidence of any trading whatever.



1820. which he was described as "a dealer in cattle, using and exercising the trade of merchandize, by way of bargaining, exchange, bartering, and chevisance, seeking his trade of living by buying and selling." The defendants were the messenger and assignees under the commission.

HALE  
v.  
SMALL.

The first cause was tried before Mr. Justice *Park*, at *Winchester*, at the Summer Assizes, 1818, when several witnesses were called to prove that the plaintiff had been a dealer in hops, and it was also suggested that he was in partnership with a person named *Gray*, who was also a large dealer in that article. An objection was taken for the plaintiff, that the defendants could not go into evidence as to a dealing in hops, on the ground that he was not described as such in the commission. The learned Judge, however, admitted the evidence, and the Jury found that the plaintiff was a dealer in cattle and hops, and gave a verdict for the defendants; but leave was given the plaintiff to move to set it aside, in case the Court should be of opinion that the defendants were not entitled to retain it. A rule *nisi*, for a new trial, having been accordingly obtained, in the *Michaelmas* Term following, the Court, in *Hilary* Term, 1819, made it absolute (a), thinking that, as the plaintiff was only described as a dealer in cattle in the commission, the evidence of his trading in hops might operate as a surprise on him, and that he might have only been prepared to rebut the trading in cattle. The cause was accordingly tried a second time, before Mr. Baron *Graham*, at *Winchester*, at the Summer Assizes, 1819, when the plaintiff's dealing in cattle was abandoned, and the defendants relied solely on his dealing in hops, which they failed to prove, and the Jury accordingly found a verdict for the plaintiff. In the last *Hilary* Term, a rule *nisi*, for granting a new trial, was obtained, on the ground

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(a) See *ante*, vol. iii. page 58.

that *Gray*, who had been in attendance in Court, was not called by the plaintiff to contradict the defendants' witnesses, many of whom had sworn that *Gray* was a dealer in hops, and that the plaintiff had been in partnership with him. That rule was afterwards made absolute, the Court thinking that *Gray* ought to have been examined as a witness. At the third trial, before Mr. Baron *Wood*,<sup>1</sup> at the last Spring Assizes, at *Winchester*, the defendants offered evidence to prove the plaintiff to have been a dealer in hops down to the date of his commission, which was objected to by the plaintiff's counsel, on the ground that the commission only described him as a dealer in cattle. The learned Baron, however, admitted the evidence, which was the only proof adduced of the trading; and the Jury gave a verdict for the defendants.

1820.

HALE  
v.  
SMALL.

Mr. Serjt. *Onslow*, on a former day in this Term, had obtained a rule *nisi*, that the last verdict might be set aside, and a new trial granted, principally, on the ground, that evidence of the plaintiff's dealing in hops should not have been admitted at the trial, the commission having only described him as a dealer in cattle; and also that such verdict was against evidence.

Mr. Serjt. *Pell* now shewed cause. An application in this case has lately been made to the Lord Chancellor to amend the commission, by inserting the words, "dealer and chapman;" but he thought it unnecessary, as it was alone sufficient to state, that a party gained his living by buying and selling, and that the particular description of the plaintiff's being a dealer in cattle might be altogether omitted. In *Ex parte Herbert* (a), where a petition prayed that a

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(a) 2 Vcs. & Bea. 399. S. C. 2 Rose's Bankruptcy Cases, 248. differently reported.

1820.

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HALE

v.

SMALL.

commission which had issued against a "waterman" might be superseded, on the ground that the description of "waterman" standing alone, was not sufficient to support a commission of bankruptcy, the Lord Chancellor said, that "dealer and chapman" had been held a sufficient description of trading, and that the general statement of the commission, that a bankrupt got his living by "buying and selling" was sufficient to support it. It is therefore unnecessary to set forth any specific mode of dealing in the commission, but merely to follow the words of the statute, which has been done in the present instance, by describing the plaintiff as a person seeking his trade of living by buying and selling. If the particular description was introduced to assist a bankrupt, by giving him notice of the dealing under which he was sought to be made bankrupt, it might be different; but the introduction of such particular description has only crept in by usage, and merely tends to shew, that a party is trading within the bankrupt laws, and gaining his livelihood by buying and selling. The words "dealer and chapman," are of themselves general and indefinite, and yet they have been held a sufficient description to support a commission. The general words, therefore, in this commission, were sufficient to warrant the Jury in finding, that the plaintiff had been a dealer in hops; and the learned Baron was perfectly correct in allowing such evidence to be received at the trial.

Mr. Serjt. *Onslow*, in support of the rule.—Although the Lord Chancellor has refused to amend this commission, still it does not follow that it was valid, nor can such refusal be considered as a decision to be used in a court of law. If a commission be bad in terms, the Chancellor will order it to be superseded, and not amended, which has never been done where it has been once acted upon. If a bankrupt be guilty of felony in not surrendering, and he afterwards learn that the commission is bad in substance, it cannot be amended

so as to create a felony *ex post facto*. The description in the present instance is a departure from the accustomed form, and evidently tends to mislead the party against whom the commission issues; and it will be most prejudicial, if it can be held that a false description, or no description whatever, is required to be stated in the commission.

1820.

HALE  
v.  
SMALL.

Lord Chief Justice DALLAS.—The objections in this case are now reduced to two, viz. that the verdict was against evidence;—and that the learned Baron who tried the cause improperly admitted proof to shew that the plaintiff had been a dealer in hops, he having been described in the commission as a dealer in cattle only. As to the first, there is no ground whatever. It is true the evidence might have been contradictory, but the Jury decided that question by their verdict, and such finding does not appear to have been disapproved of by the learned Judge. The only remaining question, therefore, is as to the validity of the commission, which was given in evidence for the purpose of proving that the plaintiff had become a bankrupt. He was there described, not merely as a dealer in cattle, but as a person seeking and getting his living by buying and selling. The question, therefore, is, whether the words “dealer in cattle,” are descriptive of the plaintiff’s person, or of the trade carried on by him? and, even if it be descriptive of the latter, whether it might not be rejected as surplusage, and the commission be supported by general evidence of a trading, it having stated, that he got his living by buying and selling? At the first trial, evidence was gone into as to the plaintiff’s being a dealer in hops, which was objected to, on the ground that he was not described as such dealer in the commission, but the general words, that he sought his livelihood by buying and selling, were then inserted therein. When this case, therefore, came before the Court, in the first instance, they thought it might operate as a surprize on the plaintiff, by the defendant’s having merely adduced evidence to prove a

1820.

HALE

v.

SMALL.

dealing in hops, as the only trading on which the bankruptcy could be supported, when he had been described in the commission as a dealer in cattle; but they did not go so far as to say, that the commission was actually bad, because, in that case, it would have been unnecessary to have sent the cause down to a new trial; but I observed, that the defendant's having gone into the plaintiff's trading in hops, it might operate as a surprise on him, and I still think that it may be highly inconvenient, although a party may be described in a commission as seeking his livelihood by buying and selling, to limit his dealings to one distinct and definite branch of trade, and at the trial to adduce evidence of his having traded in a different character, as such misdescription may tend to mislead him. At the second trial, however, any objection that might be raised as to the ground of surprise, was entirely removed, for the plaintiff had full notice, that although he was described in the commission as a dealer in cattle, yet that evidence would be gone into to establish his dealing in hops. It was therefore competent for the defendants to adduce evidence to prove such trading, and for the plaintiff to rebut it. The only question, therefore, now is, whether, as the plaintiff was described in the commission as a dealer in cattle only, the words "dealer and chapman" having been omitted, the statement that he gained his living by buying and selling is sufficient? How does it stand on reason and principle? It has been admitted, that "dealer and chapman" would be a sufficient description of trading. What additional information could these words afford to a party, who had been described generally as a person seeking "his trade of living, by buying and selling," within the terms of the statute 13 *Eliz. c. 7. s. 1*? When this case was last before the Court, my Brother *Park* observed, that (a) "Where a bankrupt is described in the commission

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(a) *Ante*, Vol. iii. page 63.

as a "dealer and chapman" only, it was a sufficient description of the trading in the commission, and that the general statement, that the bankrupt got his living by buying and selling, would admit the finding of any particular trading." If that be so, the mere statement that a party gained his livelihood by buying and selling, would be not only sufficient, but definite and precise, whether he were described as a dealer and chapman, or a dealer in cattle. If, therefore, those latter descriptions, or, in their absence, the mere expression that a party sought his living by buying and selling, will admit proof of any general trading, the only question is, whether the description of a particular trade would operate so as to exclude such general proof? That will depend on whether the commission is sufficient without such a description. In *Ex parte Herbert*, the Lord Chancellor held, that "the general statement of the commission, that the bankrupt got his living by buying and selling, was sufficient to support it." The only distinction between that case and the present is, that there the question was as to the sufficiency of the general words, while here the objection is confined as to the admissibility of evidence, to prove a general or different trading than a dealing in cattle under those words. On the whole, therefore, I am of opinion, that the term "dealer in cattle," is descriptive of the person only, and not of the trade; and that the words "buying and selling" are of themselves a sufficient description of a trading, and that it is immaterial what the nature of the trading may be—and consequently, that any evidence may be admitted under them to prove any act of trading whatever.

Mr. Justice BURROUGH.—On referring to my notes, I do not think that the expressions used by me on the former argument were quite so strong as they are reported. The persons designated by the 13 *Eliz. c. 7. s. 1.* to be deemed and taken as bankrupts, are, "any merchant, or other person

1820.

HALE

v.

SMALL.

1820.

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HALE

v.

SMALL.

using or exercising the trade of merchandize, by way of bargaining, exchange, &c.—or seeking his trade of living by buying and selling.” All the subsequent statutes adopt the same language, and the words “dealer and chapman,” are not introduced in any of them, as the general terms are in themselves sufficient to designate the description of a trader by buying and selling; but I am still of opinion, that every commission must contain some description of the party, whereby he may be known. The term “esquire” would be sufficient, if the words “seeking his trade by buying and selling” were added. But further, such description appears to me to be requisite for the purpose of giving the party notice to appear. Still, however, it is a mere designation of the party, and consequently there can be no reason to exclude evidence of any other kind of trading. In *Ex parte Herbert*, the commission described a bankrupt as a “waterman” only, and it was contended, that that description standing alone was not sufficient to support the commission, as a person who acted solely in that capacity was not liable to be made a bankrupt. But as that description related to the person only, the parties were allowed to prove a trading, as the general statement was inserted in the commission, that the bankrupt got his living by buying and selling. Here, though the plaintiff was described as a dealer in cattle, still the evidence of dealing established no other character than that of a drover, who, as such, was excepted from the operation of the bankrupt laws. But the defendants were at liberty to prove any species of trading, under the general words, that he got his living “by buying and selling;” the evidence, therefore, as to the dealing in hops, under this commission, was properly left to the Jury, and consequently I am clearly of opinion, that it was rightly admitted, and that although the plaintiff was described as a dealer in cattle only, still evidence extrinsic to such dealing might be admitted, in order to shew that he got his living by buying and selling.

1820.

HALE
v.
SMALL.

Mr. Justice RICHARDSON.—I am of the same opinion. As to the objection, that the verdict in this case was against evidence, I think there was ample proof adduced at the trial to warrant the Jury in finding a verdict for the defendants. As to the plaintiff's description in the commission, it is unnecessary now to decide whether it renders it invalid or not. As to the admissibility of the evidence to prove his trading in hops;—when this cause was first before the Court, it was objected, that such evidence ought not to have been received, and it struck us, that as the words "dealer and chapman" had not been introduced in the commission, it probably might operate as a surprise on the plaintiff, and they therefore directed a new trial; but they gave no opinion whatever as to the validity of the commission. But having now considered the effect of the general words contained in it, I am of opinion, that the statement of the party's getting his living by buying and selling, convey not only a satisfactory communication, but every information that the words "dealer and chapman" would do, and that the one is co-extensive with the other. Generally speaking, a particular description is prefixed in a commission, as a grocer or a silk-mercer, and there can be no doubt but that under such descriptions evidence might be adduced to shew that the parties were general merchants. So, under the words "dealer and chapman," there can be no doubt the like evidence would be admissible. The same rule is equally applicable to the present case; as the words "dealer in cattle," are in substance equivalent to those of "dealer and chapman." But it appears from the case of *Ex parte Herbert*, that the Lord Chancellor was of opinion, that no particular description was necessary, but that the general statement, that the bankrupt got his living by buying and selling, was of itself sufficient. Although, therefore, the plaintiff is here described as a dealer in cattle, still I think that evidence was admissible

1820.

HALE
v.
SMALL.

under the general words contained in the commission, for the Jury to find that he had been a trader, by a dealing in hops.

Rule discharged (a).

(a) In *Ex parte Small* (*), where the plaintiff petitioned the Lord Chancellor, praying that the words "dealer and chapman," might be inserted in this commission, or that it might be superseded, and a new one issued, of the same date, with a proper description,—his Lordship observed (†), that he recollected a case in which a bankrupt was described in the commission as a dealer in cinders, and the commission was ultimately supported by evidence, which established a trading in pigs; and he further observed, that when a man brings an action, in consequence of a commission issued against him, he admits that he is the person against whom the commission issued, and it is then immaterial what is the nature of the trading.

(*) 2 Wils. Chan. Cas. 85.——(†) *Id.* 86.

Friday,
May 12.

LOPES v. DE TASTET.

Under a commission issued to examine witnesses abroad, it is no objection that a clerk to the plaintiff's attorney is appointed one of the Commissioners, and settles the draft of the depositions of one of the plaintiff's witnesses.

MR. Serjt. *Vaughan* moved that the depositions of the plaintiff's son, which had been taken at *St. Petersburg*, on a commission issued in this cause, might be taken off the file or records of the Court, and that the same might be quashed, and that the plaintiff's attorney might pay the costs occasioned by the execution of such commission, on the ground that he had nominated and proposed his own clerk as one of the Commissioners on behalf of the plaintiff, and who attended the execution of the commission, and settled the draft of the examination of the plaintiff's son. He referred to *Newton v. Foot* (a), where

(a) 2 Dickens, 793.

the clerk of the plaintiff's solicitor sat as clerk to the Commissioners for examining witnesses; and the depositions taken under such commission were suppressed for that reason. So, in an *Anonymous case (a)*, a deposition taken before Commissioners was suppressed, because the attorney for the plaintiff had wrote down the whole in the exact form of the deposition, before it was taken. The learned Serjeant contended, that the same principles were equally applicable to a court of law, and that the clerk of the plaintiff's attorney ought not to have been present, or attended the execution of the commission.

1820.
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 LOPES  
 v.  
 DE TASTET.

But the Court said, that there was no ground whatever for the application;—that the plaintiff's attorney had a right to send out his clerk under the commission;—and that there would have been no objection to his attending the examinations of the plaintiff's son, although his name had not been inserted in the commission.

The learned Serjeant, therefore, took nothing by his motion.

(a) *Ambler*, 252.

BOLTON v. EYLES.

Monday,  
 May 15.

MR. Serjt. *Blosset*, on the first day of this Term, had obtained a rule *nisi*, that all the former proceedings in this cause might be set aside for irregularity, and that, in the mean time, further proceedings might be stayed, on the part of the Term:—Held, therefore, that a bill may be filed against the Warden of the *Fleet*, for an escape, on the day after the *essoign* day, entitled as of the Term generally, and if the plaintiff give a rule to plead on the first day the Court sits, he will comply with the requisition of the statute 8 & 9 W. 3. c. 27. s. 12, provided he do not sign judgment within eleven days after the filing of the bill.

The interval between the *essoign* day, and the first day of the Court's actual sitting, must be taken as

1820.

BOLTON  
v.  
EYLES.

ground that a bill had been filed against the defendant, as Warden of the *Fleet*, on the day after the essoign day of this Term, for the escape of a prisoner, who had since been discharged by virtue of an order from the House of Commons. The bill was entitled as of this Term generally, and four days' notice was given the defendant to plead thereto; but the plaintiff had not signed judgment within eleven days after the filing of the bill. He observed, that before the statute 59 *Geo. 3. c. 64*, a bill could not be filed against the Warden of the *Fleet* in vacation. The regulation introduced by 8 & 9 *W. 3. c. 27. s. 12*, is, that immediately after the bill is filed, an eight-day rule to plead may be served, and that, unless the Warden plead in three days after the expiration of such rule, the plaintiff may sign judgment.

The reason that the bill could only be filed in Term was, that the Warden was privileged to be called in Court, before which it could not be filed, and he could only be called in full Term. *Crook v. Eyles (a)*, *Stock v. Eyles (b)*. It is true, that by the 59 *Geo. 3.*, a bill might be filed against the Warden, in vacation, for an escape, but it is necessary for such bill to be entitled as of the preceding Term, to which he is bound to appear and plead within the first four days of the following Term. If, therefore, the day after the essoign day be considered as part of the vacation, still, the bill should have been entitled as of the preceding Term, and if the essoign day be deemed the first day of Term, the defendant would have been entitled to eleven days to plead, under the 8 & 9 *W. 3.*

[Mr. Justice BURROUGH.—The only question is, whether the essoign day can be considered as the first day of

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(a) 2 *Marsh.* 49. *S. C.* 6 *Taunt.* 347. — (b) 2 *Marsh.* 54. *S. C.* 6 *Taunt.* 352.

Term, or not, for the purpose of filing a bill against the Warden? If it can be, the present bill is properly filed.]

1820.

BOLTON  
v.  
EYLES.

Mr. Serjt. *Vaughan* on a subsequent day shewed cause. The only question is, whether the bill was properly entitled, or not? If it was, there is no ground for the present application. It appears by the indorsement of the Warden, that he received a copy of it on the 17th of *April* last, and it also appears to have been filed on that day. The *essoign* day was on the 16th, which, in contemplation of law, was the first day of the Term. The bill, therefore, was rightly entitled as of the present Term, and the four days' notice for the defendant to plead was strictly regular. Besides, the plaintiff had not signed judgment within the eleven days allowed the defendant to plead, under the statute 8 & 9 *W. 3.* The bill, therefore, was filed independently of the 59 *Geo. 3.*, and as judgment was not entered up within the time allowed the defendant to plead by the former statute, the proceedings on the part of the plaintiff have been correct and regular.

Mr. Serjt. *Blosset*, in support of the rule, submitted, that by the former practice of the Court, the bill could only be filed in full Term, and that the defendant could not have been called in Court between the *essoign* day and the first day of the Term, in which the Court actually sit. If the plaintiff had proceeded under the 8 & 9 *W. 3.*, the defendant would have been entitled to an eight-day rule to plead, and under that statute he would have been allowed three days further time to plead, after that rule was out; and, by the 59 *Geo. 3.*, it is quite clear, that the bill should have been entitled as of the preceding Term, whilst here it is not only entitled of the present Term, but a notice is given the defendant within four days, from the time of filing the bill; *Quacunqus viâ datâ*, therefore, the proceedings are irre-

1820.

BOLTON

v.

EYLES.

gular, and the defendant is entitled to have this rule made absolute.

Mr. Serjt. *Vaughan* applied to amend the bill; but the Court deemed it unnecessary, and observed, that the objection raised deserved consideration, and could be determined on the present application, and that the only question turned on the reasonable construction of the 59 *Geo. 3*, and whether the Legislature did not intend to provide against the mischief now complained of, viz. that a bill may be filed against the Warden for an escape, in the interval between the essoign day and the first day of the Term on which the Court actually sits.

*Cur. adv. vult.*

On this day, Lord Chief Justice DALLAS delivered the judgment of the Court as follows:—

The objection to the proceedings in this case is, that the plaintiff has filed his bill against the Warden of the *Fleet* after the essoign day of this Term, and before what is ordinarily called the first day of the Term.

It was contended, that under the statute 8 & 9 *W. 3*. c. 27. s. 12, a bill must be filed against the Warden, in Term. In support of this proposition, the cases of *Crook v. Eyles (a)*, and *Stock v. Eyles (b)*, were cited.


It has been admitted, that under a late act of Parliament, of the 59 *Geo. 3*. c. 64, a bill may be filed against the Warden, in the vacation.

In the cases above referred to, this Court held, that on the construction of the statute of 8 & 9 *W. 3*, a bill could

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(a) 2 *Marsh.* 49. S. C. 6 *Taunt.* 347. — (b) 2 *Marsh.* 54. S. C. 6 *Taunt.* 352.

not be filed against the Warden in the vacation, because it is enacted by the 12th section of that statute, that "it shall be lawful for any person having cause of action against the Warden, upon a bill filed against him in this Court, or in the *Exchequer*, and a rule being given to plead thereto, to be out eight days at most after filing such bill, to sign judgment against him, unless he plead to the said bill within three days after the rule is sued out;"—and the Court, holding that a rule to plead could only be given in term time when the Court was actually sitting, decided, that the above actions could only be commenced in full term.

1820.  
  
 BOLTON  
 v.  
 EYLES.

This being found to be attended with inconvenience, the Legislature thought it expedient that the law and practice should be altered, and therefore by the 59 Geo. 3. c. 64, intituled, "An Act to facilitate proceedings against the Warden of the Fleet, in vacation," after reciting that by the practice of the Courts of *Common Pleas* and *Exchequer*, and by reason of the former act, no proceedings could be commenced in the time of the vacation against the Warden, for or in respect of the escape of any prisoner or prisoners from or out of his custody: it is enacted, that "it shall be lawful for persons having cause of action against the Warden, for or in respect of the escape of any person out of his custody, to commence their action by filing a bill against the Warden at any time in vacation, and entitle it as of the preceding Term, a copy of which, so filed within twenty-four hours after filing, is to be delivered to the Warden or his deputy, and the Warden is to appear and plead to the bill within the first four days of the following Term, or judgment may be signed against him."

It is now contended, that admitting by the last act, a bill may be filed against the Warden in time of vacation, and by the former act, in term time, yet that a party having cause of action against the Warden for an escape in the interval be-

1820.

BOLTON  
v.  
EYLES.

tween the essoign day and the first day of the full term, cannot, during that interval; file his bill. If that be so, then that interval must be deemed *no part of the vacation or of the term*. We are of opinion that the law warrants no such conclusion.

We think we are bound to put such a construction on those statutes (and particularly on the statute 8 & 9 W. 3. on which this question arises), as will tend to prevent many serious inconveniences which would otherwise arise, and to advance the remedy of the suitor.

In contemplation of law, the essoign day is the first day of the Term. In the case of *Stanford v. Cooper* (a) it was holden, that a judgment has relation to the essoign day of the Term (as the Court says), it is, in law, the first day of the Term, and all legal acts have relation thereto. That case was recognized by the Court of *King's Bench* in the case of *Lord Porchester v. Petrie*, in *Hilary Term*, 1783 (b).

We think that the interval between the essoign day and the day of the Court's actually sitting, must be taken to be part of the term.

But, it is said, if it be so, still the bill cannot be filed, because, by the practice, it is necessary that the warden should be called in Court before the bill is filed,—that which is mere form, and rendered impossible by the Court's not actually sitting during this interval,—ought not, we think, to prevent the plaintiff from commencing or prosecuting his suit, nor ought, in our judgment, the impossibility of his giving a rule to plead before the sitting of the Court, to have that effect. We think that a plaintiff may file his bill after the essoign day, and that if he gives a rule to plead on

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(a) *Cro. Car.* 102.——(b) And see *Belk v. Broadbent*, 3 *Term Rep.* 185.

the first day of the Term, that is, the first day the Court actually sits;—he will substantially comply with the requisition of the statute of the 8 & 9 W. S.

1820.  
~  
BOLTON  
v.  
EYLES.

The rule which has been obtained by the defendant, has prevented the plaintiff from doing this in the present case.

The rule must be discharged, and the defendant must appear and plead in four days.

Rule discharged accordingly.

SPRAGG v. HAMMOND.

Monday,  
May 15th.

THIS was an action of *assumpsit* brought to recover the sum of £48. 5s. being the amount of land-tax and sewer's rates paid by the plaintiff to the use of the defendant from *Michaelmas*, 1812, to *Lady-day*, 1819. The declaration contained counts for money paid, money had and received, and on an account stated. Plea, *non-assumpsit*.

At the trial of the cause before Lord Chief Justice Dallas, at *Westminster*, at the Sittings after the last Term, it appeared that the plaintiff held certain premises forming part of the *Garrick's Head*, in *Bow Street*, under a demise from the executors of one *Spencer*, dated in *March*, 1805, for nineteen years and three quarters, at the yearly rent of £60, payable quarterly; there was no covenant or reservation contained therein as to the payment of the land tax: Held, that such acquiescence was equivalent to a dereliction of his claim in the first instance, and that he could not recover back any of the sums so paid by him for land-tax, in an action of *assumpsit* for money paid, on the ground of their being involuntary payments.

Where the tenant of premises under a lease which contained no reservation as to the payment of land-tax, claimed a deduction for such tax, which was refused by the landlord, who afterwards distrained, and was paid the whole rent, and the tenant afterwards paid his full rent for five successive years, without claiming to deduct such tax: Held,



1820.  
~  
SPRAGG  
v.  
HAMMOND.

or any other tax by the tenant. The defendant, in 1812, intermarried with *Spencer's* widow, and became entitled to receive the rent from the plaintiff under the lease in question. In *October*, 1814, the defendant called for one year and a half's rent then in arrear, which the plaintiff refused to pay, unless the land-tax, amounting to £14, was deducted, the premises having been rated as a separate tenement with poors rates, land-tax, and sewers rates in 1812, before which time it was considered as forming part of the *Garrick's Head*. The defendant however said that he would have nothing to do with the land-tax, and insisted on the payment of the full rent, which he distrained for, and it was accordingly paid by the plaintiff on the 8th of *November* following. From that time down to the 5th of *February*, 1819, when the present action was commenced, the plaintiff continued to pay the full rent as well as the land-tax, without claiming the deduction. On the 13th of *December*, 1814, however, the plaintiff's attornies applied, by letter, to the defendant, for the re-payment of the land-tax, which the plaintiff had paid previous to the distress, but which the defendant refused to allow, and stated, that in future, he would resist the payment of those sums, and he still refused to deduct them, in consequence of which the present action was brought. Under these circumstances, it was insisted, that the plaintiff was entitled to recover the above amount, as the payments made by him for the land-tax could not be considered as voluntary payments, or, that at all events, he was entitled to recover the land-tax paid by him, amounting to £14, previous to the distress in *November*, 1814, and which he then demanded, and shortly afterwards directed his attornies to apply for. His Lordship, however, was of opinion, that those payments made by the plaintiff were, under the circumstances, to be considered as voluntary, and observed, that although a deduction for land-tax was claimed by him and refused by the defendant in 1814, when the distress was made, still, as the former had paid his

full rent regularly since, without making such deductions, it amounted to an acquiescence on his part, tantamount to a voluntary payment; but he thought, that if the plaintiff had brought his action shortly after the distress was levied, he might, perhaps, have been entitled to recover the sum he then claimed to deduct. He therefore directed a nonsuit, with leave for the plaintiff to move that it might be set aside, and a verdict entered for him for such sum as the Court should direct.

1820.  
  
 SPRAGG  
 v.  
 HAMMOND.

Mr. Serjt. *Lawes*, on a former day in this Term, accordingly obtained a rule *nisi*. He observed, that at all events the plaintiff was entitled to recover the sum of £14, being the amount of the land-tax paid by him previously to the distress in 1814, when he not only insisted himself on its being allowed, but a few days afterwards directed his attornies to make an application to the defendant to that effect. Although in *Andrew v. Hancock* (a) it was held, that a tenant must claim a deduction from his landlord for sums paid by him for land-tax from the rent of the current year, still, that case was distinguishable, as it was an action of replevin, and a payment for land-tax cannot be legally set-off against a claim for rent; but the tenant has a right to recover in an action for money paid. In the subsequent case of *Stubbs v. Parsons* (b), Mr. Justice *Bayley*, in construing the 17th section of the land-tax act (c), on which the present question arises, observed, "that a payment to the land-tax can only be deducted out of the rent which has then accrued, or is then accruing due, for the law considers the payment of the land-tax as a payment of so much of the rent then due, or growing due, to the landlord; and if he after-

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(a) *Ante*, vol. iii. page 278. S. C. 1 *Brod. & Bing.* 37. — (b) 5 *Barn. & Ald.* 520. — (c) 58 *Geo. 3. c. 5.* See this section, *ante*, vol. iil. page 281.

1820.  
 SPRAGUE  
 v.  
 HAMMOND.

wards pays the rent in full, he cannot at a subsequent time deduct that over-payment from the rent: he may, indeed, recover it back as money paid to the landlord's use;" and Mr. Justice *Hobroyd* there drew a distinction between an action of this description and replevin; for he observed, that "it appeared to him, that the occupier had a lien on the next rent, given him by the Legislature for the land-tax paid by him; but that if he parts with the rent without making the deduction, he loses his lien, and has only his remedy by action or set-off, and that the latter was not allowed in replevin." Here, therefore, the tenant having been bound to pay the taxes in question when called on by the collectors so to do, the law will raise an *assumpsit* to enable him to recover from the landlord in an action for money paid to his use, and it is immaterial whether such action be brought at the time the payments were made, or not.

Mr. Serjt. *Onslow* afterwards shewed cause, and submitted, that the nonsuit was proper both in principle and on precedent. The distress was made in 1814, when the plaintiff claimed certain deductions for land-tax, which the defendant refused to allow, and the former took no steps to recover them until the commencement of the present action, at nearly the distance of six years from that transaction. In *Marriott v. Hampton* (a) Lord *Kenyon* held, that where money had been paid under the compulsion of legal process, it could not be recovered back in an action for money had and received, however unconscientiously it might have been retained by the defendant; and he observed, that "after a recovery by process of law, there must be an end of litigation, otherwise there would be no security for any person." Here, money was paid under a distress, which is clearly a legal process, and although the plaintiff then insisted on a de-

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(a) 7 Term Rep. 269.

duction for land-tax, the defendant positively refused to allow it, and as the former has taken no steps until six years had elapsed, his acquiescence for so long a period is conclusive evidence against him. In *Stubbs v. Parsons*, it was held, that payments for land-tax can only be deducted out of the current rent of the year, and whether the action be replevin or assumpsit is altogether immaterial. In *Denby v. Moore*(a), the decision of the Court of King's Bench was founded on the construction of the property-tax act (b), which required the deduction to be made out of the next rent, with a view to prevent frauds on the revenue, and the occupier having paid the full rent as well as the property-tax for several years, without claiming a deduction for the latter from his landlord, such payments were considered as voluntary, and not to be recovered back from the latter in an action for money had and received. By the terms of the first statute passed for the collection of the land-tax (c), the tenants were required to pay the rate, and deduct it out of the rents accruing due to the landlord, and this has been adopted by all the subsequent acts relating to such tax. The same construction has been put on the property-tax act in *Denby v. Moore*; and Mr. Justice Park, in *Andrew v. Hancock* (d),

1820.

SPRAGG

v.

HAMMOND.

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(a) 1 Barn. & Ald. 123. — (b) 46 Geo. 3. c. 65. Schedule A. No. 4. Rule 9. ante, vol. iii. p. 261. — (c) 4 Will. & Mary, c. 1. s. 13. by which it was enacted, that the several tenants of all and every the manors, messuages, lands, tenements, hereditaments, and premises which by virtue of that act should be chargeable with any pound-rates, were thereby required and authorised to pay such sums of money as should be rated upon such manors, &c. and to deduct out of their rents so much of the said rates as, in respect of the said rents payable for such manors, &c. the landlord should and ought to bear; and that all landlords, both mediate and immediate (according to their respective interests) were thereby required to allow such deductions and payments upon receipt of the residue of the rents; and that every tenant paying the said assessments of the pound-rates should be and was thereby acquitted and discharged for so much money as the said assessment should amount unto, as if the same had been actually paid, unto such person or persons unto whom his rent should have been due and payable. (d) Ante, vol. iii. page 291.

1820.  
 ~~~~~  
 SPRAGG
 v.
 HAMMOND.

observed, that "although the property-tax might differ, in terms, from the land-tax act, yet, that the effect of both was the same as to this point, and that they must receive a similar construction." That case is precisely in point, although it differed as to the form of action; but that, as well as *Stubbs v. Parsons*, shew, that payments made by a tenant for land-tax, must be deducted out of rent accrued, or then accruing due. No distinction can be drawn between replevin and an action for money paid, as to this point; and it is a well known and established principle of law, that if a party pays money with a full knowledge of facts, but in ignorance of law, such payment cannot be recovered back.

Mr. Serjt. Lawes in support of the rule.—The plaintiff is, at all events, entitled to recover the sum of £14 paid by him for land-tax, previous to the distress, and which he then claimed to be deducted, either as money paid, or money had and received by the defendant to his use, and, in point of principle and authority, he is equally entitled to recover all the payments made by him subsequent to that period. Nothing can be more just than that a person who pays money on account of another, should be reimbursed, and more particularly so, when such a payment is unavoidably made in the first instance. Here, the plaintiff could not resist the payments of the land-tax to the collector as they became due. That tax may be considered as a tax on the tenant for the purposes of collection and certainty of payment; but as between landlord and tenant, it must be deemed a tax on the former, and must eventually be borne by him. The distinction was taken by Mr. Justice Buller in *The King v. The Inhabitants of Mitcham (a)*, where he observed, that "it was not a landlord's tax with respect to the public, though

(a) 1 Dougl. 225, n. S. C. Cald. 276.

it was as between landlord and tenant." There too, the tenant agreed to pay all taxes; but here, there was no covenant or stipulation whatever, to throw the *onus* of such payments on the tenant. Although the case of *Stubbs v. Parsons* is confirmatory of the decision of this Court in *Andrew v. Hancock*, still, they are both inapplicable to the present, as the plaintiff does not claim the payments made by him as deductions from the rent, but as money paid to the defendant's use; and the Court, in the former case, clearly intimated that such an action as the present was maintainable. The payments were not made without consideration, and there can be no doubt but that they were made expressly on account of the defendant. In *Exall v. Partridge* (a), it was held, that if a payment be compulsory on the plaintiff, the law implies a promise of re-payment, and Lord Kenyon there admitted (b), that where one person was surety for another, and compellable to pay the whole debt, and was called upon to pay, that it was money paid to the use of the principal debtor, and might be recovered in an action against him for money paid, even though the surety did not pay the debt by the desire of the principal." So here, the tenant stood in the situation of surety for the payment of the land-tax, which the landlord was eventually liable by a legal obligation to repay. In *Hales v. Freeman* (c) it was held, that an executor who paid the legacy duty on an annuity eight years after the death of the testator, might recover the amount from the legatee in an action for money paid, although the legatee had assigned the annuity long before;—on the ground, that the payment of the legacy duty by the executor was compulsory, as he stood in the situation of a statutable trustee or surety to the legatee. So here, the tenant is compellable, by statute, to pay the tax to

1820.

 SPRAGE
 v.
 HAMMOND.

(a) 3 Term Rep. 308. — (b) *Id.* 310. — (c) *Ante*, page 21.
 S. C. 1 Bred. & Bing. 391.

1820.
 SPRAGG
 v.
 HAMMOND.

government; but the ultimate obligation is on the landlord, who is merely exonerated *pro tempore* from the payments made by the tenant. In *Astley v. Reynolds* (a), where a pawnbroker detained goods, and compelled the person pawning to pay more than the legal interest before he redeemed them, it was held that an action for money had and received was maintainable for the surplus so paid. So here, the distress in 1814 for the whole of the rent was improper, but the plaintiff paid it, relying on his legal remedy to get back the payments then insisted on by him, and to be deducted in an action of this description. The case of *Graham v. Tate* (b), appears to be undistinguishable from the present, where it was held, that if a landlord distrains and sells for the whole rent, without deducting the property-tax, the tenant may recover back *pro tanto* in an action for money had and received; and Lord *Ellenborough* observed (c), that "the tenant was obliged to pay the full amount of the rent under the distress, if the landlord would not consent to make the deduction in respect of the property-tax." Here, the plaintiff was bound to pay both the landlord and the collector, as either might distrain on him in case of non-payment, and the former having distrained for the whole rent due, the plaintiff is entitled to recover the surplus. In *Denby v. Moore*, the payment was not made under a distress, but after an acquiescence by the occupier for twelve years to pay the full rent to the landlord, without claiming any deduction, and the action was not commenced until after a final settlement of accounts had taken place between the parties; and it was there considered to be a voluntary payment. *Marriott v. Hampton* is beside the present question, as the payment was made under the compulsion of legal process, in an action which the party might have defended successfully

(a) 2 *Strange*, 915. — (b) 1 *Maule & Selw.* 609. — (c) *Id.* 611.

if he had been prepared with evidence. There too, the defendant gave a *cognovit* for the costs of the action, which was his own act, and therefore cannot be assimilated to a payment compulsorily made under a distress for rent.

1820.

~
 SPRAGG
 v.
 HAMMOND.

Mr. Serjt. *Onslow*, in reply to the additional cases cited for the plaintiff, observed, that *Graham v. Tate* was relied on for the plaintiff in *Denby v. Moore*, but that the former merely determined the form of action, which was brought immediately after the payment had been made, and not after an interval of six years, as in the present instance. Besides, there, there was no communication between the parties, nor did the landlord refuse to allow the deduction before the distress was made. *Hales v. Freeman* was decided on the particular terms of the statute regulating the payment of legacy duties, by which an executor was not to be deemed liable in contemplation of law, as he stood in the situation of a trustee, unaccompanied with interest, and that the legatee, who received the sole benefit, was only responsible. *Astley v. Reynolds* was founded on a payment made by an immoral and illegal compulsion, where the party paying had no means of exercising his discretion.

Cur. adv. vult.

Lord Chief Justice DALLAS on this day, after having shortly recapitulated the facts, delivered the judgment of the Court as follows:—We are of opinion that this case, from its circumstances, is not to be distinguished from the former decisions, which have established, that a payment like the present, is to be considered as voluntary, and therefore cannot be recovered back in an action of this description. It would be altogether superfluous to comment on the different grounds which have led to these decisions, as they are most fully stated in the printed reports of this Court as well as those of the *King's Bench*. It is therefore only

1820.

SPRAGG

v.

HAMMOND.

necessary to refer to them generally. Still, however, it must be observed, that the present is, if any thing, more unfavourable to the plaintiff; for a subsequent and uniform acquiescence by him for nearly six years after he demanded the first deduction, operate more strongly against him than if such payments had been made in ignorance: for his having laid by so long in silence, is equivalent to a dereliction of such resistance. The single point on which the Court has entertained a doubt has been, as to the sum of £14 claimed to be deducted by the plaintiff at the time the distress was taken in 1814. With this view, the case of *Graham v. Tate* has been consulted, but it does not appear to be applicable in favour of the plaintiff, for there the claim made for the property-tax was immediately followed up, and never abandoned, which takes it out of the general grounds on which actions of this description have been decided. The consequence is, that this rule must be discharged, and the nonsuit stand.

Rule discharged.

Monday,
May 15.

BUCKLAND v. BUTTERFIELD and Another, Assignees of
BUCKLAND, a Bankrupt.

A conservatory erected on a brick foundation affixed to and communicating with rooms in a dwelling-house, by windows and doors, cannot be removed by

THIS was an action on the case, in nature of waste, brought by the plaintiff, as tenant for life, against the assignees of her son, who had become bankrupt, and to whom she had demised certain premises from year to year, and who had also a remainder in fee in them after her death. The first count of the declaration stated, that the bankrupt held and as a tenant for years, who had erected it during his tenancy, although he had a reversion in fee after the death of his lessor.

enjoyed a certain dwelling-house and premises, as tenant from year to year to the plaintiff, the reversion thereof belonging to her, and that his assignees, intending to injure her reversionary interest, pulled down, removed, and carried away, a conservatory and pinery, and converted the materials thereof to their own use. The second count was in trover.—Plea, Not guilty.

1820.

 BUCKLAND
 v.
 BUTTERFIELD.

It appeared from the report of Mr. Baron *Graham*, before whom the cause was tried, at the last Assizes at *Aylesbury*, that the plaintiff was entitled to the premises for life, under the will of her late husband, remainder to her son in fee, who rented them of his mother as a yearly tenant, and who had become bankrupt;—that the conservatory removed by the defendants, was purchased by the bankrupt, some time before his bankruptcy, and erected by him on a foundation of brick-work, fifteen inches deep, on which was bedded a sill;—that it consisted of wood and glass, and that the frame-work was placed on the sill;—that it was attached to the dwelling-house by cantilivers, which were let nine inches into the wall, and fastened thereto with wedges;—that over the conservatory was a balcony, with iron rails resting on those cantilivers, and which had a communication with the drawing-room, on the first floor, through a folding door;—two windows were also opened from the lower part of the house into the conservatory, one from the dining-room, and the other from the library, and it was heated by a flue communicating with the chimney of the dining-room.—The pinery had been erected in the garden, on a brick wall four feet high. Two surveyors proved, that the difference of value in the premises, after the removal of the conservatory and pinery, was at least £50 a year. It was also proved, that the plaintiff was seventy years old. The learned Judge was of opinion, that she was entitled to recover for the pinery, as it might be deemed a permanent improvement; and he observed that she might probably be entitled to the value of the conservatory

1820.

BUCKLAND
v.
BUTTERFIELD.

also. The Jury, estimating the plaintiff's life at six years purchase, found a verdict for her for £900, being the deterioration of the value of the premises for that period, as stated by the surveyors.

Mr. Serjt. *Peake*, on a former day in this Term, had obtained a rule *nisi* for a new trial, on the grounds, first, of a misdirection of the learned Judge; secondly, that the conservatory, at all events, was removeable by the tenant or his assignees, as it was merely an ornamental erection, and not beneficial to the premises; and lastly, that the damages were excessive. In support of the second ground, he relied on the distinctions laid down by Lord *Ellenborough*, in *Elwes v. Maw* (a), and also referred to the cases of *Beck v. Row* (b), *Ex parte Quincy* (c), and *Lawton v. Lawton* (d).

Mr. Serjt. *Blosset* afterwards shewed cause.—First, The damages cannot be considered as excessive, as it was proved at the trial, that the premises were deteriorated in value to the amount of £50 *per annum*, by the removal of the conservatory and pinery. Besides, the plaintiff's life might fairly be estimated as being worth six years purchase, according to the tables referred to in the statutes for granting insurances on lives. She is, therefore, clearly entitled to retain the verdict to the amount of the sum found by the Jury. Secondly, This case is wholly distinguishable from those which were referred to when the rule was obtained; for the conservatory was not only affixed to the freehold, and erected on a foundation fifteen inches deep, but formed part of the dwelling-house, as doors were made communicating with different rooms, and the house was in fact completely altered by its erection. This, too, is not, in point of strictness, a ques-

(a) 3 *East*, 51. — (b) 1 *P. Wms.* 94. — (c) 1 *Atk.* 477.
(d) 3 *Atk.* 13.

tion as between landlord and tenant, for the plaintiff was only entitled to the freehold during her life, and the reversion in fee went to her son after her death. She, therefore, could not have removed the erections in question, although her son's yearly tenancy might have been put an end to, as it would have been an injury to his reversionary interest. The general rule, in every case of this description, is, to consider the intention of the parties, and it cannot be considered for a moment that the bankrupt intended to remove them during the term he might continue a tenant to his mother, but that he erected them for the sole and express purpose of benefiting and improving his reversionary interest in the premises. The learned Serjeant referred to a case of *The Marquis of Townshend v. ———*, where it was determined, that glasses and frames, resting on brick work in a nursery ground, were not removeable (a).

1820.

 BUCKLAND
 v.
 BUTTERFIELD.

Mr. Serjt. Peake, in support of the rule.—The question is not, whether the plaintiff can maintain any action;—but whether she is entitled to retain the verdict to the amount found by the Jury, for the injury done to her interest in the premises, by the removal of the conservatory and pinery in question? It is true, that this case is distinguishable from those that have preceded it, as the bankrupt was not only a yearly tenant to the plaintiff, but was also entitled to the reversion in fee after her death;—but in this instance, he must be considered as standing in the former capacity only, and the greatest latitude and indulgence have always been allowed in cases of this nature, as between landlord and tenant, distinguishing them from claims arising between an heir and executor, or the executors of a tenant for life, and the reversioner. Articles which may be deemed fixtures, as between landlord and tenant, must be not only affixed to, but become part of the freehold, and the removal of them

(a) But see Lord Kenyon's opinion, in *Penton v. Robert*, post, p. 445.

1820.

 BUCKLAND
 v.
 BUTTERFIELD.

must cause an irreparable injury to the landlord; but all ornamental erections, which may not be beneficial to the premises, or improve the property for the purposes of occupation, may be removed by the tenant. It has been decided, that marble chimney-pieces, pier glasses, and wainscot affixed to the freehold by screws, may be removed. In *Elwes v. Maw* (a), Lord *Ellenborough* drew a distinction between erections made for the purposes of trade or agriculture. But mere ornamental erections may be removed in every instance; and in *Beck v. Rebow* (b), Lord Keeper *Comper* held, that "hangings and looking-glasses were only matter of ornament and furniture, and not to be taken as part of the house or freehold, but removeable by the lessee of the house." In *Ex parte Quincy* (c), Lord *Hardwicke* said, that "during the term, a tenant might take away chimney-pieces, and even wainscot, which was a very strong case." So, a picture, whether it be small or large, and affixed to the wall of a house, by a hook or holdfasts, may be equally removeable, although the removal of the one may cause a greater injury to the house than the other. Here, the conservatory formed no part of the habitable premises, was by no means beneficial to the property, or necessary to its occupation, and was removed without doing any material injury to the dwelling-house. It was erected merely for the purpose of ornament, and so far from being a matter of usefulness, or convenience, it might be considered by a succeeding tenant, more frugal than the bankrupt, as a useless incumbrance, and tending to increase his expences. If the house had been rendered less convenient by the alteration of the windows and doors, an action might be brought by the plaintiff to recover damages commensurate with the injury sustained by her in that behalf; but here the damage complained of, is by the removal of those erections which, in point of fact, formed

(a) 3 *East*, 55.——(b) 1 *P. Wms.* 95.——(c) 1 *Atk.* 477.

no part of the premises. The pinery, perhaps, was not in strictness removeable, as it might be considered to render the garden more valuable. The distinction between ornamental annexations to the freehold, and those erected for the purposes of trade, is taken by Lord *Hardwicke*, in *Lawton v. Lawton* (a), and recognized by Lord *Ellenborough*, in *Blwes v. Maw* (b). In *Lawton v. Salmon* (c), salt pans were holden to go to the heir, and not to the executor, as Lord *Mansfield* considered them not as accessory to the carrying on a trade, but as the means of enjoying the benefit of the inheritance; for he observed (d), that "the inheritance could not be enjoyed without them; that they were accessories necessary to the enjoyment and use of the principal; and that the owner erected them for the benefit of the inheritance itself." In *Penton v. Robart* (e), Lord *Kenyon* asked, "What tenant will lay out his money in costly improvements of the land, if he must leave every thing behind him, which can be said to be annexed to it? Shall it be said that the great gardeners and nurserymen in the neighbourhood of this metropolis, who expend thousands of pounds in the erection of green-houses and hot-houses, &c. are obliged to leave all those things upon the premises, when it is notorious that they are even permitted to remove trees, or such as are likely to become such, by the thousand, in the necessary course of their trade? If it were otherwise (he observed), the very object of their holding would be defeated." On principle, therefore, as well as by previous decisions, a tenant may remove all things erected for the benefit of trade, unless they form a beneficial part of the premises. So, all ornamental erections may be removed, unless they form a necessary or convenient annexation to the freehold—and more particularly so, if the landlord sustains no injury by the removal. If he does, he

1820.

BUCKLAND
v.
BUTTERFIELD.

(a) 3 Atk. 15.——(b) 3 East, 5S, 4.——(c) 1 H. Bl. 259, n.——
(d) Id. 260, n.——(e) 2 East, 90.

1820.
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BUCKLAND
v.
BUTTERFIELD.

may be entitled to recover damages commensurate to that injury. So, here, the plaintiff cannot be entitled to recover according to the annual diminution of the value of the premises, by the removal of the conservatory, to which the bankrupt was entitled, and which he might have removed at any time during the term he continued to be a tenant to the plaintiff.

Cur. adv. vult.

Lord Chief Justice DALLAS, on this day, delivered the judgment of the Court as follows:—

This was an action on the case, tried before Mr. Baron Graham, at the last Assizes at *Aylesbury*. The question in the cause, as far as relates to the motion now before the Court, was, whether a conservatory affixed to the house, in the manner specified in his report, was so affixed as to be an annexation to the freehold, and to make the removal of it waste. In the argument and judgment of the Court of *King's Bench*, in *Elwes v. Maw* (a), will be found at length, all that can relate to this, and other cases of a similar description. It is not necessary to go into the distinctions there pointed out, as they relate to different classes of persons, or to the subject-matter itself of the inquiry. Nothing will here depend on the relation in which the parties stood to each other, or the distinction between trade and agriculture; for this is merely the case of an ornamental building, constructed by the party for his pleasure, and the question of annexation arises on the facts reported to us; and I say, the facts reported, because every case of this sort must depend on its own special and peculiar circumstances. On the one hand, it is clear that many things of an ornamental nature may be in a degree affixed, and yet during the term may be removed; and, on the other hand, it is equally clear that there may be

(a) 3 East, 38.

that sort of fixing or annexation which, though the building or thing annexed may have been merely for ornament, will yet make the removal of it waste. The general rule is, that where a lessee, having annexed a personal chattel to the freehold during his term, afterwards takes it away, it is waste. In the progress of time, this rule has been relaxed, and many exceptions have been grafted upon it. One has been in favour of matters of ornament, as ornamental chimney-pieces, pier-glasses, hangings, wainscot fixed only by screws, and the like. Of all these, it is to be observed that they are exceptions only, and therefore, though to be fairly considered, not to be extended; and with respect to one subject in particular, namely, wainscot, Lord Hardwicke treated it as a very strong case. Passing over all that relates to trade and agriculture, as not being connected with the present subject, it will be only necessary to advert, as bearing upon it, to the doctrine of Lord Kenyon, in *Penton v. Robart* (a), referred to at the Bar. The case itself was that of a building for the purpose of trade, and consequently standing upon a different ground from the present; but it has been cited for the *dictum* of Lord Kenyon, which seems to treat of green-houses and hot-houses erected by great gardeners and nurserymen as not to be considered as annexed to the freehold. Even if the law were so, which it is not necessary to examine, still, for obvious reasons, such a case would not be similar to the present; but in *Elwes v. Maw*, speaking of this *dictum*, Lord Ellenborough said (b), "there exists no decided case, and I believe no recognized opinion or practice, on either side of *Westminster Hall*, to warrant such an extension." Allowing, then, that matters of ornament may or may not be removeable, and that whether so or not must depend on the particular case, we are of opinion that no case has ever extended the right to remove nearly so far as it would be extended, if such right were to be estab-

1820.

BUCKLAND

v.

BUTTERFIELD.

Bishop v. Elliott
3 Com. Law R. 1227
11 East: 113

(a) 2 East, 88. — (b) 3 East, 56.

1820.

BUCKLAND
v.
BUTTERFIELD.

lished in the present instance, under the facts of the report, to which it will be sufficient to refer; and, therefore, we agree with the learned Judge in thinking, that the building in question must be considered as annexed to the freehold, and that consequently the removal of it would be waste.

Rule discharged.

Monday,
May 15.

SOILY and Another v. FORBES and ELLERMAN.

In the construction of a deed, regard must be had to all its parts, and general words are to be restrained by a particular recital contained therein, and if a deed operate two ways, the one consistent with

THIS was an action of *assumpsit*. The declaration contained counts for money paid, lent, had and received, interest, and on an account stated, as well as counts for work and labour done and performed by the plaintiffs, as agents to both the defendants. The defendant *Forbes* pleaded *non-assumpsit*, on which issue was joined. *Ellerman* pleaded, first, *non-assumpsit*; secondly, a release; and, thirdly, a set-off. The plaintiffs, in their replication, craved *oyer* of the

the intent of the party, and the other repugnant to it, the Court will put such a construction on it as to give effect to such intent, which is to be derived from the whole of the instrument. Therefore, a release must be construed according to the particular purpose and intent for which it was made—as where *A.* and *B.*, being in partnership, and in insolvent circumstances, *A.* alone gave a general release by deed to the plaintiffs, to whom himself and *B.* were jointly indebted, with provisions that it should not operate to release or prejudice any demands which the plaintiffs had against *B.*, either separately, or as a partner with *A.* on the joint effects of *A.* and *B.*, or either of them, and that they might commence an action at law, either against *A.* jointly with *B.*, or *A.* separately, for the purpose of enabling the plaintiffs to recover payment from the joint estate of *A.* and *B.*, or from *B.*'s separate effects; and the plaintiffs brought an action of *assumpsit* for money paid, against both, and *A.* pleaded the release, on which the plaintiffs set it out on *oyer* in their replication, and averred that the action was prosecuted against both, for the purpose of enabling the plaintiffs to enforce payment from *A.* and *B.* either from their joint estate, or the separate estate of *B.*:—Held, on general demurrer thereto, that the action was authorized by the deed, and the Court over-ruled the demurrer.—*Semble*, that such replication is no departure from the declaration.

release, which was set out *verbatim*, and was in substance an indenture, dated the 20th May, 1819, and made between the plaintiffs, as merchants and copartners in trade, in London, of the one part, and the defendant *Ellerman*, late of *Hamburg*, merchant, but then residing and carrying on trade in *Heligoland*, of the other part, by which indenture, (after reciting, that up to 1806, *Ellerman* carried on the trade or business of a merchant at *Hamburg*, and also at *Toningen*, in partnership with the defendant *Forbes*, under the firm of *Forbes and Ellerman*, and that there were various transactions of business between them and the plaintiffs; and that about the month of *March* in that year, both the defendants having become embarrassed in their affairs, stopped payment, and that, upon the balance of accounts between them and the plaintiffs, the former were justly indebted to the latter, as such copartners, in a considerable sum of money, the whole of which debt still remained unpaid, and was then due and owing from the defendants to the plaintiffs; and that *Ellerman* had lately offered and proposed to pay them £3000, in the manner therein after mentioned, if they would give and execute to him such release or discharge, for or in respect of their aforesaid debt or demand on the defendants, as thereafter was contained):—It was witnessed, that, in consideration of £600, paid by *Ellerman* to the plaintiffs, immediately before the execution of the indenture, the receipt whereof they thereby acknowledged, and also in consideration of twenty-four promissory notes of *Ellerman*, each for £100, and bearing date respectively the 1st April, 1809, and which notes were made payable to the plaintiffs, or their order, successively, at one, two, three, four, five, six, seven, eight, nine, ten, eleven, twelve, thirteen, fourteen, fifteen, sixteen, seventeen, eighteen, nineteen, twenty, twenty-one, twenty-two, twenty-three, and twenty-four months date (each of the said notes being numbered, and the number of each corresponding with

1820.
SOLLY
&
FORBES.

1820.

BOLLY

v.

FORBES.

the number of months it had to run), the receipt of which said notes (amounting, together with the said sum of £600, to the before-mentioned sum of £3000, so agreed to be paid to and accepted by the plaintiffs), the plaintiffs did also thereby acknowledge, and, pursuant to, and in execution of the agreement therein before recited, on their part, they, and each of them, had remised, released, and for ever discharged, and by that indenture did, and each of them did, remise, release, and for ever discharge, *Ellerman*, his executors, administrators, and assigns, of, from and against all and all manner of actions and suits, cause or causes of action or suit, debt, sum and sums of money, accounts, bonds, bills, notes, contracts, agreements, promises, damages, claims and demands whatsoever, in law and in equity, which the plaintiffs then had, or which they, or either of them, their, or either of their executors, administrators, or assigns, thereafter could, should, or might have against *Ellerman*, his executors, administrators, or assigns, for or by reason of any matter, cause, or thing whatsoever, relating to the premises, from the beginning of the world, to the day of the date of the indenture, except and subject nevertheless to the following provisoes, declarations, or agreements therein contained. First :—That, the said indenture, or any matter or thing therein contained, should not release, or be construed or taken to release, or in any manner to prejudice and effect any claims or demands which the plaintiffs, or either of them, ever had, or then had, or which they, or either of them, or either of their executors or administrators, thereafter could, should, or might have, upon or against *Forbes*, either separately or as a partner with *Ellerman*, or the executors, administrators, or assigns of *Forbes*, or upon or against the joint estate or effects of *Forbes* and *Ellerman*, in respect of the debt so due from them to the plaintiffs, or any part of such joint estate or effects, whether the same should be in the hands of, or recoverable from the defend-

ants, or either of them, or any other person or persons whomsoever. Secondly, That it might be lawful for the plaintiffs, their executors, administrators, or assigns, from time to time, when, and as they should be thereto advised, to commence and prosecute any actions, suits, or other proceedings, either at law or in equity, against *Ellerman* jointly with *Forbes*, or against *Ellerman*, his executors, administrators, and assigns separately, for the purpose of recovering or compelling, or of enabling the plaintiffs, their executors, administrators, or assigns, to recover or compel payment or satisfaction of the debt so due and owing from the defendants to them as aforesaid, either by or out of any the joint estate or effects of the defendants, or by or from *Forbes*, his executors, administrators, or assigns, or his separate estate or effects. And lastly, that in case default should be made in the due payment of any two of the before-mentioned promissory notes, successively to fall due in such manner, as that any two of them should be due and unpaid at the same time, then the indenture, and every matter and thing therein contained, should, from and immediately after such default, be absolutely void and of no effect; and that the said sum of £600, and all or any other sums or sum of money which might at that time have been paid, and also all or any other sums or sum which might, at any time or times from and after such default, be paid in any of the aforesaid promissory notes, should be carried to the credit of both the defendants with the plaintiffs, and all the rights, claims, and demands of the plaintiffs, their executors, administrators, or assigns, by reason or in respect of the debt therein before mentioned to be due to them from the defendants, either upon or against them, jointly or separately, their, or either of their executors, administrators, or assigns, or any other persons or parties whomsoever, should, from and immediately after such default, be in full force and virtue (as to so much of the debts so due to the plaintiffs as afore-

1820.

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SOLLY
 v.
FORBES.

1820.

SOLLY

v.

FORBES.

said as should remain unpaid, in like manner, to all intents, effects, constructions and purposes, as if the indenture had never been made, any thing therein contained to the contrary thereof in anywise notwithstanding. This indenture was duly executed, and the following memorandum added thereto:—"This deed is deposited by the plaintiffs, with *J. S.* who is to deliver it to *Ellerman*, his executors or administrators, or his or their order, after due payment of the within-mentioned twenty-four promissory notes, according to the tenor and meaning of the within-written indenture; but in case of any default in payment of the notes, or any of them, according to the tenor and meaning of such indenture, *J. S.* is to deliver up the same to the plaintiffs, their executors or administrators, to be cancelled; and in the mean time, the indenture is to remain in the hands of *J. S.* for the purposes aforesaid."—The replication then concluded as follows:—Which being read and heard, the plaintiffs say, that by reason of any thing by the defendant *Ellerman* in his plea alleged, they ought not to be barred from having their aforesaid action thereof against him, because they say, that *Forbes*, with whom the defendant *Ellerman* is jointly sued in this action, and the said *Forbes*, in the said supposed writing of release mentioned, are one and the same person, and not other or different persons, and that the said *Forbes* is so sued as aforesaid, as a partner with the said *Ellerman*, in respect of a certain part of the monies in the said supposed writing of release mentioned to be due and owing from the said *Forbes* and *Ellerman*, to the plaintiffs, to wit, at, &c. And the plaintiffs further say, that this action is prosecuted against the said *Ellerman* jointly with *Forbes*, for the purpose of recovering or compelling, or of enabling the plaintiffs to recover or compel payment or satisfaction of the monies so due and owing from the said *Forbes* and *Ellerman*, to the plaintiffs, as aforesaid, either by or out of the joint estate or effects of *Forbes* and *Ellerman*, or by or from *Forbes*, or his separate

estate or effects, to wit, at, &c. And this, &c. Wherefore, &c.

1820.

SOLLY

v.

FORBES.

To this replication there was a general demurrer and joinder. The plaintiffs also replied to the plea of set-off, that they were not indebted to *Ellerman* in manner and form alleged, and on which issue was joined.

The cause came on for argument, on a former day in this Term, when Mr. Serjt. *Blosset*, in support of the demurrer, submitted, first, That the provisoes contained in the indenture of release were void, as being contrary and repugnant to the nature of the deed. Secondly, That the release could not be taken advantage of by the plaintiffs in their replication, in this manner, as it was a departure from the declaration, which was in general terms. And, lastly, That no issue could be joined on the latter averment in the replication, as it was merely expressive of the meaning or purpose of the plaintiffs. As to the first point, the leading principle is laid down by the Master of the Rolls, in *Bradley v. Peixoto* (a), and which extends to grants and deeds of every description, viz. that "where there is a gift, with a condition inconsistent with and repugnant to such gift, the condition is wholly void;"—and his Honour there observed, that there were several cases collected in *Danvers' Abridgment* (b), which shew, "that a condition repugnant to the nature of the estate given, is void." In *Moore and Savill's* case (c), where a tenant in tail leased lands by indenture, to a father, mother, and son, for their lives, with a proviso, that if the latter should demand or take any profits of the lands so demised, or enter into the same, during the life of his father or mother; that the estate limited to him by the inden-

(a) 3 Ves. jun. 325. — (b) Vol. ii. 22. — (c) 2 Leonard, 152.

1820.

~
 SOLLY
 v.
 FORBES.

ture should cease. The Court held, that the proviso was utterly void, as it was contrary to the estate before limited. So, if a person lease lands to *A. B.* for twenty years, with a proviso, that he shall not occupy the same the two first years, such proviso is void, and repugnant to the estate. In *Stukeley v. Butler* (a), it is said, that "a condition annexed to an estate given, is a divided clause from the grant, and therefore cannot frustrate the grant precedent, neither in any thing expressed, nor in any thing implied, which is of its nature incident and inseparable from the thing granted." In *Rolle's Abridgment* (b), it is laid down, that on a general warranty, with a proviso that he to whom the warranty was made, nor his heirs, should not have in value by force of the warranty, such proviso is not good. So, a gift in tail, upon a condition that the donee shall not levy a fine, or suffer a recovery; or that the wife shall not be endowed, or the husband shall not take by the curtesy, such conditions are repugnant and void (c). All these authorities, therefore, have long since established a rule, that if a proviso or condition be inconsistent with the nature of the deed, either as expressed on the face of the instrument, or to be implied by law, such condition is altogether void; and as the release here is set out in general terms in the indenture, and the provisos contain exceptions for particular and specific purposes, they are altogether void, and the release itself remains in full effect. Secondly, The replication is a departure from the declaration, which is in the common form against both the defendants, and charges them in every possible way, whilst the replication seeks to charge one only. If *Ellerman* had not availed himself of the release, and pleaded it, the plaintiffs would have been entitled to judgment and execution against both the defendants; and if they had applied

(a) *Hobart*, 170. — (b) 1. 419. l. 25. — (c) *Id.* 418. l. 25. 30.

to a court of equity, they could have obtained no relief, as it would be said, that their only remedy was at law, where the release might be pleaded, which was intended to protect the person and separate property of *Ellerman*. At all events, the equity of the case is with the defendants,—and the replication is a departure from the declaration, which charges them both in as extensive a manner as possible, while by the former it appears that both were not liable. This, therefore, is a departure in substance, as a replication must not only be conformable to, and co-extensive with the declaration, but must support it in all its material points. Lastly, no issue can be joined on the replication, as it merely states the particular motives of the plaintiffs in prosecuting the action,—and the defendants had no previous notice whatever indicative of such purpose. In *The King v. Griepe* (a), it was held, that “a man’s meaning, abstracted from the fact, cannot be put in issue.” So, in *Booth’s case* (b), it was resolved, that an intent is not traversable because it cannot be tried.

1820.
SOLLY
v.
FORBES.

Mr. Serjt. *Bosanquet, contra*.—The indenture, as set out on oyer, does not preclude the plaintiffs from suing the defendants jointly in the present action which has been commenced against both for the sake of conformity, although it is in fact instituted for the purpose of recovering a debt due to the plaintiffs from *Forbes*. The intention of the parties is manifest on the face of the deed, and the Court will construe it so as to effectuate such intent, and will not allow it to be set up for the purpose of discharging the defendant *Forbes*; and if the plaintiffs proceed to judgment or execution against *Ellerman*, he will have his remedy against them for any damages he may sustain in consequence, by an action on the deed. Although it

(a) 1 *Ld. Raymond*, 261.——(b) 5 *Rep.* 77 b.

1820.

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 SOLLY  
 v.  
 FORBES.

is inartificially drawn, still it is apparent from the whole of the instrument, that it is, in substance, in the nature of a covenant not to sue, and though it is strictly in the form of a release, it cannot operate as such. It will be therefore unnecessary to touch on the authorities, by which it has been determined, that if there be a conveyance of an estate by deed, and an exception, which either defeats or is by direct opposition to it, such exception is void. But if the deed can operate in two ways, the one consistent with the exception, and the other not, the Court will endeavour to discover means to render the deed operative in conformity with the exception. In *The Earl of Clanrickard's case* (a), Lord Chief Justice Hobart observed, that "he exceedingly commended the Judges who were astute to invent reasons and means to make acts according to the just intent of the parties, and to avoid wrong and injury, which, by rigid rules, might be wrought out of the act;" and Lord Hale recognised and adopted that *dictum* in *Crossing v. Scudamore* (b), as well as Lord Chief Justice Willes, in *Roe, d. Wilkinson v. Trimmer* (c), where it was determined, that if a deed be void as a release, it should have the effect and operation of a covenant to stand seised to uses. The doctrine applicable to releases of action is thus laid down in *Bacon's Abridgment* (d), "Heretofore releases were construed with much nicety and great strictness, and being considered as the deed or grant of the party, were, according to the rule of law, taken strongest against the releasor, they now receive such interpretation as other grants and agreements do, and are favoured by the Judges, as tending to repose and quietness. Hence it hath been established as a general rule in the construction of releases, that where there are general words only in a release, they shall be taken most strongly against the

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(a) *Hobart*, 277. — (b) 1 *Vent.* 141. — (c) 2 *Wils.* 78. — (d) *Tit. Res.* *louse*, vol. iv. 263, 3d edit.

releasor; but where there is a particular recital in a deed, and then general words follow, the general words shall be qualified by the special words." That doctrine was carried into effect in *Knight v. Cole* (a), and approved of by Lord *Ellenborough* in *Payler v. Homersham* (b), where he observed, that "common sense requires that the general words of a release may be restrained by the particular recital, and that in order to construe any instrument truly, regard must be had to all its parts, and most especially to the particular words of it." So in *Goodtitle, d. Edwards v. Bailey* (c), Lord *Mansfield* said, that "the rules laid down in respect of the construction of deeds, are founded in law, reason, and common sense: that they shall operate according to the intention of the parties, if by law they may; and if they cannot operate in one form, they shall operate in that which by law will effectuate the intention." In *Sheppard's Touchstone* (d), it is said, that "a deed that is intended and made to one purpose, may enure to another, for if it will not take effect the way it is intended, it may take effect another way; and therefore a deed made or intended for a release, may amount to a grant of a reservation, an attornment, or a surrender, or *à conversé*." Here the deed recites, that the defendants were co-partners, and indebted to the plaintiffs as such, and that *Ellerman* undertook to pay the amount of the debt, if the plaintiffs would give him a release in respect of their demand on both. But it was expressly provided that the plaintiffs should not release any demands they had against *Forbes*, either separately or as a partner with *Ellerman*, and it was further declared and agreed that the plaintiffs might prosecute any actions against *Ellerman* jointly with *Forbes*, or *Ellerman* separately. This action, therefore, is

1820.  
  
 SOLLY  
 v.  
 FORBES.

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(a) 1 *Showers*, 154, 5. S. C. 3 *Lect.* 273. 3 *Mod.* 277. — (b) 4 *Maule & Selw.* 426. — (c) *Cowp.* 600. — (d) 7th edit. by *Atherley*, p. 82.

1820.  
 SOLLY  
 v.  
 FORBES.

properly brought against both, and *Ellerman* was joined for conformity, and he may be protected by the deed, as it amounts to a covenant by the plaintiffs not to sue, still the debt is due to them from both him and *Forbes*. In *Dean v. Newhall* (a) it was held, that "where an obligee covenants not to sue one of two joint and several obligors, and that if he did sue, the deed of covenant might be pleaded in bar, he may still sue the other obligor." That case was fully commented on by Lord Chief Justice *Gibbs*, in *Hutton v. Eyre* (b), where *A.* and *B.* being in partnership, agreed to dissolve it, and that after the dissolution each should make purchases on his own private account. *A.* afterwards assigned his property to his creditors, who covenanted not to sue him, and that if they did, the deed of assignment should be a release to him, which deed *B.* signed, and *A.* after signing it, having contracted debts in the name of the firm, which *B.* paid, it was held, that he was liable for those debts, as the covenant not to sue *A.* did not operate as a release to *B.* and Lord Chief Justice *Gibbs* said (c), that "the rule, that a covenant not to sue operates as a release, applies only to cases where the covenantor and covenantee stand alone, and not where the covenantor is indebted jointly with another." From all these authorities it appears, that the Court will give such a construction to a deed as will best effectuate the intention of the parties, and although a release may be in general terms, still it may be controlled by a particular exception. It has been further insisted, that the replication is a departure from the declaration, but it appears from the very terms of the deed, that the plaintiffs may sue the defendants jointly. Until the release was set up by *Ellerman*, it was unnecessary to state it, and although he was only joined for conformity, still the object of the replication is perfectly

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(a) 8 Term Rep. 168. — (b) 1 Marsh. 603. S. C. 6 Taunt. 289. —  
 (c) 1 Marsh. 608.

conformable to and consistent with the declaration; and if they had not both been sued, it would be good ground for a plea is abatement. It was lastly contended, that the intention of a party cannot be put in issue, but in an action against a person who has been discharged under an insolvent act, and who pleads such discharge, it is necessary to state in the replication that the plaintiff intends to proceed against his effects, and not his person,

1820,  
SOLLY  
v.  
FORBES.

[Mr. Justice *Richardson*.—If a bankrupt who has obtained his certificate be sued, is it necessary for the plaintiffs to state that they intend to go against his effects, and not his person?]

The principal point here is, whether, taking the whole of the deed together, it is not, in substance, a covenant not to sue, and not operating as a release, or constituting a bar to the present action.

Mr. Serjt. *Blosset* in reply.—In cases of bankruptcy or insolvency, it is never stated in the replication that the plaintiff intends to proceed against the effects only, and not to charge the person of the defendant, for the course is for the plaintiff to take the effects in conformity with the judgment, as the plea amounts to a discharge of the person, and therefore the law only gives a remedy against the property.

[Lord Chief Justice *Dallas*.—The deed was meant to operate in favour of *Ellerman* only, and if the intention of the parties be looked at, it cannot be doubted for a moment that the plaintiffs were to be deprived of their remedy against both the defendants.]

The former had a remedy in equity, the latter none. Although the deed may operate merely as a covenant not to sue, and not as a release, still it was never contemplated that *Eller-*

1820.

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 SOLLY  
 v.  
 FORBES.

*man's* only remedy was by bringing an action of covenant for damages, in case the plaintiffs proceeded to judgment and execution against him. In *Hutton v. Eyre*, Lord Chief Justice Gibbs, in commenting on the case of *Dean v. Newhall* (a) said, that "it was there contended, that the covenant was an actual release to the party with whom it had been made, and that if that were so, it would undoubtedly have operated in favour of his co-obligor." Here the question is, whether the provisoes or exceptions in the deed can control the legal operation of the release itself, as set out therein, which was intended to apply to the joint debts of both the defendants.

[Mr. Justice Burrough.—If it was the intention of the parties that the deed should apply to *Ellerman* only, ought not the Court to construe it as a release to him alone? It strikes me at present, that he was to be deemed circuitously liable, viz. if the plaintiffs could not recover from *Forbes*.]

There is a wide distinction where a covenant not to sue may enure as a release, and *à converso*; and the question in this case does not touch on the authorities cited for the plaintiffs, for in strictness there can be no legal operation contrary to the release itself, and although there may be a particular exception, it cannot vary or give a new operation to the effect of the instrument. At all events, this is a departure, as the declaration is in the common form against both the defendants, and cannot be narrowed, and it appears by the replication, that the plaintiffs can only sue out judgment, and proceed to execution against *Forbes* only; nor does it appear on the face of the replication that *Ellerman* was joined for conformity.

*Cur. adv. vult.*

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(a) 1 *Marsh.* 606.

Lord Chief Justice DALLAS on this day delivered the judgment of the Court as follows:—

1820.

SOLLY

v.

FORBES.

The circumstances under which this case comes before us will appear by referring to the pleadings at large. And the general question that arises is, whether the release, as set forth, constitutes a bar to the action. Of the intention of the parties no doubt whatever can be entertained. It was meant to release *Ellerman* as to person and effects, but not *Forbes*, and therefore to retain against *Ellerman* every right and remedy necessary to enforce payment from *Forbes*, but so to construe the release as to make it a release of both, which it would be, if no action could be brought against *Forbes*, because *Ellerman* could not be joined, would make it operate, not to effectuate, but to defeat the intent of the parties; as little doubt can exist upon the words made use of to effectuate the intent as upon the intent itself. It is not an absolute and unqualified release, but in terms conditional and provisional, being made subject to an exception, such exception forming part of the same sentence with the words of release, and immediately connecting with and attaching upon them, and introductory to and followed up by a proviso, by which it is expressly declared, that nothing contained in the deed of release shall be taken to release, or in any way prejudice or affect any demands of the plaintiffs either against *Forbes* separately, or as a partner with *Ellerman*. Now it would be to release, and in every way to affect the demand against *Forbes* as partner with *Ellerman* to give such operation to the release, as in effect to make it a release to both, by making it a bar to an action, in which, for the recovery of a joint debt, both must be jointly sued. Nor does this even rest on negative, though necessary, construction; for in a subsequent part of the deed it is expressly provided and declared to be the true intent and meaning of the release, that it shall be lawful for the plaintiffs to commence and prosecute any action against *Ellerman* jointly

1820.

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 SOLLY  
 v.  
 FORBES.

with *Forbes*, for the recovery of the joint debt due from them, and this is a joint action, for the recovery of such debt being therefore an action expressly and in direct terms authorised by the deed of release itself. But against this, objections of a technical and artificial nature have been proposed, and we have been referred to many cases in which it has been held that a saving or condition repugnant to the nature of the grant, is void, and that the grant remains absolute and unqualified, the condition no way operating in restraint of the grant.

It is not necessary to pursue these cases into their detail; they are all cases of notoriety, the law of which is not to be disputed, and the only question is upon their application; but with respect to them all, I would observe, that in one of the cases cited at the bar (*a*), it was correctly stated, that the rule of construction in modern times has been more equitable than formerly, Courts looking rather to the intention of the parties than to the strict letter, not suffering the latter to defeat the former but in certain cases of exception, to which it is not now necessary to refer. Taking these cases, however, such as they are, the application sought to be established is altogether fallacious. It is assumed, that wherever the word "release" is made use of, it must operate absolutely and unconditionally, though immediately, and in the same sentence followed by words that shew it to be partial and particular only, and the general words being in no respect repugnant to the special words, but the latter a qualification merely of the former leaving the release to operate to every purpose except to the exclusion of the particular purpose which the parties have declared it to be their intention, it shall not exclude. This being apparent

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(a) *Roe, d. Wilkinson v. Tranmer*, 3 Wils. 78.

both in terms and meaning, what are the rules of law which apply, narrowing them to the particular point?

1826.  
  
 SOLLY  
 v.  
 FORBES.

I pass over the general and leading principle, that the intent of the parties shall prevail as far as by law it may; and further, that Courts will be anxious so to construe the law as to give effect to that intent, provided it do not contravene any fundamental rules of the policy of the law. If a deed can therefore operate two ways, one consistent with the intent, and the other repugnant to it, Courts will be ever astute so to construe it, as to give effect to the intent, and the construction, I need not add, must be made on the entire deed. The passage cited at the bar is to this effect material: "I exceedingly commend the Judges (said Lord Hobart) that are curious and almost subtle to invent reasons and means to make acts according to the just intent of the parties, and to avoid wrong and injury which by rigid rules might be wrought out of the act (a);" and it has been correctly added, that in the case of *Crossing v. Scudamore*, Lord Hale cited and approved of that passage, which was again referred to by Lord Chief Justice Willes, in *Roe, d. Wilkinson v. Tranmer* (b), and has been also cited to have been approved of, and to be a governing rule in many other cases. Not to go through all the authorities that are to be found, it will be sufficient to select one or two only, and these will refer to the rest.

In *Morris v. Wilford* (c), it was expressly decided, "that a release should be construed according to the particular purpose for which it was made;" and it appears from a note to that case, that *Jones, Wild, and Twysden*, (Justices,) were of opinion on the first argument, that the release was no bar notwithstanding the general words, for that being made for

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(a) *Hobart*, 277. — (b) 2 *Wils.* 78. — (c) 2 *Show.* 47.



1820.

SOLLY

v.  
FORBES.

*particular purposes*, the general words were to be guided by the particular purposes. *Raynsford*, Chief Justice, *contra*.

But the case was argued a third time, when by the whole Court judgment was given for the plaintiff. In *Payler v. Homersham* (a), Lord *Ellenborough* adopted the position that the general words of a release may be restrained by the particular recital. "Common sense (said his Lordship) requires that it should be so, and in order to construe any instrument truly, you must have regard to all its parts, and most especially to the particular words of it." The case cited from *Rolle* (b), is to this effect, though said to have been denied by Lord *Holt* to be law (c), seems to me as sound a case as can be stated (d) (said Lord *Ellenborough*), and Mr. Justice *Bayley* added (e), "there is no doubt but a particular recital in a deed will restrain the general words."

On all these grounds, therefore ; the apparent intent of the parties ; sufficient words to effectuate that intent ; the special nature of the release ; as formed by the very language in which it is itself created ;—the matter upon which it is to operate ; and the known and established rules of construction to be collected from the authorities referred to, we are of opinion that the demurrer ought to be over-ruled ; and in conclusion I will only say, that it is not intended to interfere with any received principles or established cases, but to decide only on this particular case with reference to its special nature, calling in aid former authorities only in the manner in which it has been endeavoured to apply them. But for further

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(a) 4 *Maule & Selw.* 426.

(b) 2 *Roll. Abr.* 409.

(c) See *Knight v. Cole*, 1 *Show.* 155.

(d) The words of that case were, "If a man receives £10 of another, and by his deed acknowledges the receipt of it, and thereof releases, acquits, and discharges him, and of all actions, suits, and demands whatsoever : by this release nothing is released, but the £10, and the action and demand for it ; for the last words have reference to the first, and are so limited by them."

(e) 2 *Maule & Selw.* 427.

caution, I will add, the decision of the Court only is, that this demurrer be over-ruled.

1820.

SOLLY

v.

FORBES.

It is not necessary now to say any thing as to any ulterior remedy the defendant *Ellerman* may have or suppose himself to have; in this respect he will act as he may be advised, and as circumstances may seem to require.

Demurrer over-ruled.

CLARKE v. DAVEY.

Monday,  
May 15th.

THIS was an action of trespass for seizing and taking away the plaintiff's waggon. Plea Not Guilty.

A constable who assists a parish officer in levying a distress for poor-rates, under a warrant of magistrates directed to such officer, is not liable to an action of trespass, although a demand was duly made on such constable in pursuance of the statute 24 Geo. 2. c. 44. s. 6.

At the trial of the cause before Mr. Baron Garrow, at the last Assizes at *Chelmsford*, it appeared that the plaintiff having neglected to pay his poor-rates, after having been summoned so to do, two magistrates issued their warrant, directed to the churchwardens and overseers of the poor of the parish in which he was rated, to enforce the payment of such rates. That one of the overseers, on the 6th of June, 1819, took the defendant (a constable) with him, to the plaintiff's house, to assist in the execution of the warrant; that on their arrival, the plaintiff told them that they might take the waggon in question if they thought proper, which they accordingly did, and which was afterwards sold. That on the 13th of October following, the plaintiff demanded a

The distress having been made on the 6th of June, and the action not commenced till the 6th

of December following.—*Quære*, whether it was brought within six calendar months after the act committed, as required by the eighth section of that statute?

1820.

CLARKE  
v.  
DAVEY.

copy of the warrant from the defendant, who returned for answer that it was not directed to him, but to the parish officers, and that he merely accompanied one of the overseers to assist him in the execution of such warrant. The present action was commenced against the defendant on the 6th of *December* last. Under these circumstances, it was insisted, that the action was not maintainable;—First, as the defendant was protected by the 24 *Geo. 2. c. 44. s. 6 (a)*, or that the demand of the warrant should have been made by the plaintiff from the overseer to whom it was directed; and secondly, that the action was not brought in time within the eighth section of that statute (*b*), as the trespass was committed on the 6th of *June*, and the suit was not commenced until the 6th day of *December* following; and the case of *Norris v. The Hundred of Gawtry (c)* was relied on, where the plaintiff brought a writ on the statute of *Hue and Cry*, and the robbery was laid on the day it was committed, viz. 9th *October*, 13 *Jac.* and the *teste* of the writ ran 9th *October*, 14 *Jac.* and after verdict for the plaintiff it was moved that the writ was not brought within the year after the robbery

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(a) By which it is provided, that “no action shall be brought against any constable, headborough, or other officer, or against any person or persons acting by his order and in his aid, for any thing done in obedience to any warrant under the hand or seal of any Justice of the Peace, until demand hath been made or left at the usual place of his abode, by the party or parties intending to bring such action, or by his or their attorney or agent in writing, signed by the party demanding the same, of the perusal and copy of such warrant, and the same hath been refused or neglected for the space of six days after such demand: and in case, after such demand and compliance therewith, any action shall be brought against such constable, &c. without making the Justice or Justices who signed or sealed the said warrant, defendant or defendants, that on producing and proving such warrant at the trial of such action, the jury shall give their verdict for the defendant or defendants, notwithstanding any defect of jurisdiction in such Justice or Justices.”

(b) By which it is provided, that “no action shall be brought against any Justice of the Peace for any thing done in the execution of his office, or against any constable, headborough, or other officer or person acting by his order and in his aid, unless commenced within six calendar months after the act committed.”

(c) *Hobart*, 139.

committed, which were the words of the statute 27 *Eliz.* c. 13, and it was held, that in cases that depended not on writings dated, but upon time to be reckoned from acts done, as, in that case from the robbery committed, which must be confessed was done on the 9th of *October*, 13 *Jac.* and that there could not be two ninth days of *October* in one year, and that the plaintiff might have brought his action the same first day without doubt. So here, the action should have been commenced on the 5th day of *December* at latest.

1820.  
CLARKE  
v.  
DAVEY.

The Learned Baron was of opinion, that under these circumstances, the defendant was not liable, but the Jury found a verdict for the plaintiff.

Mr. Serjt. *Vaughan*, on a former day in this Term, had obtained a rule nisi that this verdict might be set aside, and a nonsuit entered, on the above grounds.

Mr. Serjt. *Lawes* now shewed cause.—Although the defendant acted in aid of one of the parish officers in executing the warrant, it furnishes no defence to the present action; besides, a demand was duly made on him, and as he did not comply with the terms of such demand, the plaintiff was prevented from substituting the overseer to whom the warrant was directed, as a defendant in his stead. The defendant was not acting under the warrant. He was therefore a trespasser *ab initio*, and even if he had, he would not have been protected by the sixth section of 24 *Geo. 2. c. 44*, as he neglected to give the plaintiff a perusal and copy of the warrant, although it was demanded on the 13th of *October*, and the action was not commenced till the 6th of *December* following. If the plaintiff had joined the overseer in the present action, the defendant might have been entitled to a verdict, but as he neglected to comply with the demand made on him as constable, the plaintiff is entitled to recover.

1820.

CLARKE

v.

DAVEY.

Mr. Serjt. *Faughan*, in support of the rule, having stated that when the demand was made on the defendant, he answered, that the warrant was in the custody of the overseer, to whom it was directed, was stopped by the Court.

Lord Chief Justice DALLAS.—The defendant merely acted in aid of the overseer, who was one of the persons to whom the warrant was directed, and although the former filled the situation of constable, he did not act in obedience to the warrant. I therefore am of opinion that the plaintiff is not entitled to maintain this action.

Mr. Justice BURROUGH.—It is quite clear that the defendant did not act under the warrant, as it was not directed to him, but to the churchwardens and overseers, one of whom he assisted in its execution. The defendant never had the warrant in his possession. The plaintiff, therefore, should have made a demand on the overseer to whom it was directed, and who acted under it.

Mr. Justice RICHARDSON.—The defendant does not require the protection of the statute 24 Geo. 2. c. 44, for the plaintiff had no cause of action against him as a constable, as he merely assisted a parish officer to whom a warrant of magistrates was directed, and who acted in obedience to it by levying for poor rates by way of distress, in pursuance of the terms of such warrant.

Rule absolute for a nonsuit.

END OF EASTER TERM.

# CASES

ARGUED AND DETERMINED

IN THE

Courts of Common Pleas

AND

Exchequer Chamber

IN TRINITY TERM,

IN THE FIRST YEAR OF THE REIGN OF GEORGE IV.

1820.

DOE, on the Demise of EVANS v. ROE.

Monday,  
June 5.

**MR.** Serjt. *Lens* moved for judgment against the casual ejector in this cause, on an affidavit which stated, that only one part of the premises was tenanted, and that the other was vacant;—that a copy of the declaration had been served on the tenant personally, who occupied the one, and that another copy had been affixed on the door of the other part of the premises which was vacant; that more than half a year's rent was due, by virtue of a lease then unexpired, and which contained a power of re-entry in case of non-payment of rent on certain days therein specified; and that no sufficient distress could be found on the premises.

In ejectment, if one part of the premises be vacant, and the other in the occupation of a tenant, it is sufficient for an affidavit to ground a motion for judgment against the casual ejector, to state, that a copy of the declaration was served on the tenant who occupied the one part, and that another copy was affixed on the door of that part which was vacant.

Granted (a).

(a) See all the cases collected on motions of this description, 1 *Tidd*, 7th Edit. 503 to 508, *Impey's Practice C. P.* 6th Edit. 588 to 592. 597, &c.

1820.

Monday,  
June 5.

## TRIPP v. PATMORE.

Where, in an action on a bond, the defendant, after plea, had admitted the debt, but obtained a rule for a Special Jury, the Court would not order the cause to be tried within the Term, unless the plaintiff shew, whether it was a fit cause to be tried by a Special Jury, or not.

MR. Serjt. *Lawes* moved that this cause might be tried within the Term, on the ground, that the defendant had obtained a rule for a Special Jury, merely for delay. The action was brought on a common money bond, and the defendant had pleaded *non est factum*, and *solvit post diem*, the latter of which pleas had been afterwards withdrawn. He read an affidavit, which stated, that the defendant had admitted the money to be due from him to the plaintiff on the bond, and he relied on the case of *Blaxam v. Brewer* (a), where, upon suggestion that a rule for a Special Jury had been obtained for delay, the Court would not discharge the rule, but directed the cause to be tried by a Special Jury, within the Term.

But the Court held, that it was necessary for the plaintiff to state further grounds, from which they might judge whether this were a fit cause to be tried by a Special Jury, or not.

The learned Serjeant, therefore, took nothing by his motion (b).

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(a) 4 Term. 470.

(b) In *Cradock v. Davis*, 1 Chit. 176, the Court of King's Bench would not discharge a rule for a Special Jury, where there was sufficient reason to believe that it was material to the defendant to have his cause tried by a Special Jury. See also *Maltby v. Moses*, 1 Chit. 489, and the cases there collected, as to where rules for a Special Jury have been discharged or not, on the ground of having been obtained for the mere purpose of delay.

1820.

Monday,  
June 5.**BARLOW and Others, Executors of MARK BARLOW,  
deceased, v. BROADHURST.**

**T**HIS was an action of *assumpsit*. The first count of the declaration stated, that the defendant, before the death of the testator, to wit, on the 23rd of *September*, 1808, made his note in writing, bearing date on that day, whereby, after reciting, that by the award of *W. H.* the defendant was awarded to pay to the representatives of his father-in-law, the testator, 500*l.* and that he, the testator, was in want of 100*l.* part of the said 500*l.* to supply his necessary occasions, which the defendant had, on the day aforesaid, paid to him, and taken a receipt; and that the security for 500*l.* had been delivered up by the testator to be cancelled, but the defendant was to give a note for the remaining sum of 400*l.* payable at the time mentioned in the award and security;—the defendant, therefore, promised to pay to the representatives of the testator 400*l.* in three months next after his death, without any interest for the same in the mean time, and pursuant to such award, *first deducting thereout any interest or money which he* (the testator) *might owe to the defendant on any account*; that the defendant delivered the note to the testator, in his life-time, by means whereof, and by force of the statute, he became liable to pay him according to the tenor and effect of the note. The plaintiffs then averred the death of the testator, on the 1st of *April*, 1819; that he appointed them his executors; and that they had duly proved his will: that they have always been ready to permit the defendant to deduct from the said sum of 400*l.* in the note mentioned, all interest on any money which might be owing from the testator to the defendant, on any account between them; and that three months from the time of the death of the testator had long since elapsed:—By means whereof, the defendant became liable to pay to the plaintiffs, as his executors, the said sum of 400*l.* in the note specified, after deducting thereout any inte-

A promissory note, reciting that "the defendant had been awarded to pay 500*l.* to the representatives of *J. S.* and that he had paid him 100*l.* in his life-time, and thereby promised to pay his representatives 400*l.*, three months after his death, pursuant to the award, first deducting thereout any interest or money *J. S.* might owe to the defendant on any account,"—may be given in evidence in an action brought by the representatives of *J. S.* against the defendant, on an account stated between him and *J. S.* although it was improperly stamped as a promissory note.



1820.

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BARLOW

v.

BROADBENT.

rest, or any money which might be owing from the testator to the defendant; and assigned for breach, that although they requested him to pay them that sum, after such deductions, that he refused to do so. The second, and only other count, was on an account stated between the defendant and the testator.—Plea, *Non-assumpsit*.

At the trial of the cause, before Lord Chief Justice Dallas, at Guildhall, at the Sittings after the last Term, on the production of the note in evidence, it appeared that it was stamped with a three-shilling note stamp, as well as an agreement-stamp of one pound; when it was objected for the defendant, that as it was made payable three months after the death of Barlow (the testator), it required a stamp for 8s. 6d.; to which it was answered, that it might be treated either as a promissory note or an agreement, and that it might be given in evidence under the account stated. His Lordship being of that opinion, directed the Jury to find a verdict for the plaintiffs, which they accordingly did; but leave was given the defendant to move to set it aside, and enter a nonsuit, in case the Court should be of opinion that the plaintiffs were not entitled to recover.

Mr. Serjt. Peake now moved accordingly, and observed, that, by the 55 Geo. 3. c. 184. Sched. part 1, the instrument in question, if it was a promissory note, required a note stamp of 8s. 6d.; and that by the 44 Geo. 3. c. 98, the holder had no remedy thereon, if it bore a stamp of inferior value, to that required by the stamp acts, or was of a different denomination; that if it were not such a note, and did not require a stamp of that value, there was no count in the declaration on which the plaintiffs could maintain their action, as there was nothing on the face of it to shew, that there was a stated account between the defendant and the testator. That the plaintiffs, therefore, should have declared specially, as there was no promise by the defendant to pay a precise or definite sum, or to come to a future account.

But, *Per Curiam*.—It is stated in the declaration, that the defendant had been previously awarded to pay to the representatives of the testator the sum of 500*l.*; that he had paid him 100*l.* in his life-time; and that the note was given for the remaining sum of 400*l.*, payable to his representatives three months after his death. That alone was sufficient to shew that there was an account stated between the defendant and testator; but the terms of the note were to pay a certain sum, “first deducting thereout any interest or money the testator might owe to the defendant on any account.” The deductions, therefore, must rest entirely in contingency; and the instrument cannot be considered as a promissory note to pay a certain or definite sum, or at all events. The defendant admitted a sum to be due from him to the testator; that, therefore, was sufficient to enable the plaintiffs to give the instrument in evidence, under the account stated; and it was the duty of the defendant to shew, what interest or monies were due to him from the testator on that account.

1820.

 BARLOW
 v.
 BROADHURST.

Rule Refused(a).

(a) See *Watkins v. Hewlett*, ante, vol. lii. 211.

COLYER v. SPEER, Esq.

Tuesday,
 June 6.

THIS was an action on the case, and brought against the defendant, as late Sheriff of *Surrey*, for levying on the goods of one *Pannell*, under a writ of *fiery facias*, and removing them, without paying the plaintiff a year's rent, which he claimed

In an action against the sheriff for removing goods under an execution, without satisfying the landlord's

claim of a year's rent:—Held, first, that a trustee of an outstanding satisfied term, in trust for mortgagees, and to attend the inheritance, must be considered a landlord within the statute 8 *Anne*, c. 14. s. 1, and entitled to maintain such action. Secondly, that a notice to the sheriff, before the removal, stating that a year's rent was due from the tenant to the mortgagor (naming him), and the mortgagees of his estates, and signed by the receiver of the rents, is sufficient, although such receiver was not appointed by the mortgage-deed. Thirdly, that it was the duty of the sheriff to levy for the rent in the first instance, and then for the execution; and he must retain a sufficient sum to satisfy such rent, before he remove any of the goods from off the premises.

1820.
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 COLYER  
 v.  
 SPEER.

to be due to him, as landlord of the premises. The declaration stated, that *Pannell*, for the space of one year and upwards, next before, and ending on the 29th of *September*, 1819, and from thence to the time of committing the grievance thereafter mentioned, held a certain farm, in the parish of *Worplesdon*, in the county of *Surrey*, as tenant thereof to the plaintiff, at a yearly rent of 500*l.* payable quarterly, and that a year's rent was due to him on the 29th of *September* in that year; that on the 14th of *October*, such rent being still due and unpaid, the defendant, being then Sheriff of *Surrey*, by virtue of a *feri facias* issued out of this Court, at the suit of one *Copeland*, directed to him as such sheriff, took certain goods then being on the farm so held by *Pannell*, to the value of 3000*l.* The plaintiff then averred, that after taking the goods, and before their removal, the defendant, as such sheriff, had due notice of the said rent being in arrear to the plaintiff, and assigned for breach, that the defendant, intending to deprive him of the means of recovering his said arrears of rent, wrongfully and unjustly removed the said goods, so taken by virtue of the writ, from the premises, without paying or satisfying the plaintiff the rent so due and in arrear to him as aforesaid.—Plea, Not Guilty.

At the trial of the cause, before Lord Chief Justice *Dallas*, at *Westminster*, at the Sittings after the last Term, it appeared, that *Pannell* held the estate in question under an agreement for a lease, for the term of twenty-one years, from one *Woodroffe*, who was seised thereof in fee, and which agreement was dated on the 30th of *September*, 1811; that on the 5th of *October*, 1812, *Woodroffe* charged the estate with an annuity of 468*l.*, and on the 2d of *April*, 1813, with a further annuity of 92*l.*—and that, by deed of the latter date, *Woodroffe*, at the request of the purchaser of the annuities, granted the estate to the plaintiff for the term of ninety-nine years, in trust, to secure the payment

thereof; that on the 22d of *February*, 1816, *Woodroffe* borrowed 10,000*l.* on mortgage, and redeemed the annuities, and, by indenture of that date, conveyed the estate in fee to the mortgagees, subject to the payment of the mortgage money. But, by a proviso contained therein, it was declared, that the plaintiff should from thenceforth stand possessed of the estate comprised in the said term of ninety-nine years, then outstanding and satisfied, in trust, for the mortgagees, for the better securing the payment of the sum of 10,000*l.* and interest, and, in the mean time to attend the inheritance, in order to protect the same against mesne charges and incumbrances; and that until default was made in payment of that sum, and interest, the mortgagor might quietly enjoy the lands;—and by the deed, a person by the name of *Seton* was appointed receiver of the rents for the mortgagees. The following notice was served on the defendant, addressed to him as sheriff of *Surrey*, and to *Mr. Jarris*, his officer, and all others whom it might concern—and which was dated on the 2nd of *November*, 1819:—

“ *Copeland v. Pannell.*”

“ Sir,

“ I do hereby give you notice, that there is due to *William Woodroffe, Esq.* and the mortgagees of his estates, in the parish of *Worplesdon*, in the county of *Surrey*, from *John Pannell*, the defendant, the sum of 500*l.*, for one year's rent due at *Michaelmas* day last past, which you are to pay to me, as receiver of the rents of the same estates.”

“ *R. Edwards.*”

It was proved at the trial, that not much more than one-half of *Pannell's* property was removed by the sheriff under the execution. His Lordship being of opinion, that the term of years originally vested in the plaintiff, was kept up by the proviso contained in the mortgage-deed; held, that this action was well brought in his name, the reversion being in him. He also thought that the notice was good in substance,

1820.  
COLYER  
v.  
SPEER.

1820.

COLYER  
v.  
SPENCER.

and accordingly directed a verdict for the plaintiff, which the Jury accordingly found for 500*l.*, the amount of the rent due. Leave, however, was given the defendant to move to set it aside, and enter a nonsuit, if the Court should be of opinion that the action was not maintainable.

Mr. Serjt. *Pell*, accordingly now moved for a rule *nisi*, on the following grounds :—First, That the plaintiff had not made out a sufficient title to enable him to maintain this action. Secondly, That the notice to the defendant, as sheriff, was vague and insufficient. And lastly, That as it appeared in evidence, that all *Pannell's* property was not removed by the sheriff under the execution, it ought to have been shewn, that that which remained, was not sufficient to satisfy the plaintiff's claim for rent. First, The plaintiff cannot be considered as a landlord within the statute 8 *Anne. c. 14. s. 1. (a)*, as he was merely the trustee of an outstanding satisfied term, and the intention of the legislature was, to protect persons who were beneficially interested in, and had a legal claim for rent, as landlords of the premises. The action, therefore, should have been brought in the name of *Woodroffe*, and not of the plaintiff. Secondly, Before an action of this descrip-

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(a) By which it is enacted, that “ no goods or chattels whatsoever, lying or being in or upon any messuage, lands, or tenements, which were or should be leased for life or lives, term of years, at will, or otherwise, should be liable to be taken by virtue of any execution, on any pretence whatsoever, unless the party at whose suit the said execution was sued out, should, before the removal of such goods from off the said premises, by virtue of such execution or extent, *pay to the landlord of the said premises, or his bailiff, all such sum or sums of money as were or should be due for rent for the said premises, at the time of the taking such goods or chattels, by virtue of such execution, provided the said arrears of rent did not amount to more than one year's rent, and in case the said arrears should exceed one year's rent, then the said party, at whose suit such execution was sued out, paying the said landlord, or his bailiff, one year's rent, might proceed to execute his judgment, as he might have done before the making of this act ; and the sheriff, or other officer, was thereby empowered and required to levy, and pay to the plaintiff, as well the money so paid for rent, as the execution-money.*”

tion can be maintained against a sheriff, he must have notice that rent is due to the landlord, although the statute is silent as to the necessity of such notice. The defendant could not be deemed a wrong-doer, if he had removed the goods without receiving a notice of the landlord's claim. Besides, it was averred in the declaration, that he had due notice of the rent being in arrear; whereas such notice is bad both in form and substance. In *Arnitt v. Garnett* (a), Mr. Justice *Holroyd* said, that "the landlord is clearly entitled to his rent, unless he has waived his right; that the statute expressly says, that the goods are not to be removed, unless the plaintiff pay the rent;—that it was true, that no action would lie against the sheriff for any act done by him before he had notice of the landlord's claim, because until such notice the sheriff could not be a wrong-doer." So, in *Palgrave v. Windham* (b), which was an action on the case against the defendant, as bailiff of a liberty, for executing a *feri facias*, and removing goods off the premises, before the landlord was paid his year's rent, Mr. Justice *Powys* held, that the action being against the officer for the tort, a notice was requisite, yet, that the want of alleging it was helped by the verdict. In *Waring v. Dewberry* (c), it was held, that the landlord must demand the rent, or the sheriff is not bound to secure it. So, in *Smith v. Russell* (d), Mr. Justice *Lawrence* observed, that it appeared to him that it was expressly held, in the case of *Waring v. Dewberry*, that the landlord must give notice to the sheriff.

1820.

COLYER  
v.  
SPENCER.

Here, the notice did not shew to whom the rent was due. If the plaintiff can be deemed entitled to it as trustee, it should have been specifically stated that it was due to him. On the other hand, if the mortgagees had been accustomed to receive it, they should have been named,—or if *Wood-*

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(a) 3 Barn. & Ald. 440.—(b) 1 Strange, 212.—(c) 1 Strange, 97.  
(d) 3 Taunt. 401.

1820.  
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 COLYER
 v.
 SPEER.

roffe alone had received it, the sheriff should have been required to pay him, without coupling the mortgagees. Besides, the receiver named in the mortgage-deed was the only person who should have given the notice. Thirdly, The Jury have found a verdict for the full amount of the rent due. It appears, that little more than half of the property was removed by the sheriff, *non constat*, therefore, that there was not sufficient left on the premises to satisfy the rent then due; and it does not appear, whether it is not still remaining there.

Lord Chief Justice DALLAS.—At the trial, the plaintiff rested his title on certain deeds which were not then fully investigated; but I am now clearly of opinion, that he was entitled to maintain this action, the legal and reversionary interest being vested in him; and there can be no doubt but that he might have maintained an ejectment on such a title. As to the notice, it was contended, that none was necessary; but here, the sheriff was, at all events, informed that rent was due to some one. I thought, that in point of principle, some notice was necessary; and the case of *Arnutt v. Garnett* was referred to, to shew at what time the notice might be given to the sheriff.

But when the notice in question was produced, I thought it quite sufficient, as it expressly stated, that 500*l.* was due for one year's rent, at *Michaelmas* preceding. As to the removal, it is quite clear, that under the circumstances, the defendant was not only bound not to remove any of the goods, after having received notice of the rent being in arrear, but he should at all events have retained sufficient to satisfy such rent. It appeared too, that the whole of *Pannell's* property sold under the execution, amounted to about 1000*l.*, more than half of which was removed by the defendant. I therefore am of opinion that the verdict ought to stand.

1830.
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 COLVER  
 v.  
 SPENCER.

Mr. Justice PARK.—I am also of opinion, that there is no ground whatever for disturbing this verdict. By the statute 8 Anne, the party at whose suit an execution is sued out, must, before the removal of the goods from the premises, pay the landlord whatever may be due to him for rent at the time of taking the goods; and can it be contended, that the plaintiff is not to be considered as a landlord within the terms of that statute, when he has a sufficient and legal title vested in him to maintain an action of ejectment? Besides, no goods whatever can be removed without payment of the rent due to the landlord. The sheriff, therefore, is bound, after notice, not to remove any of the goods, without first retaining the rent. It is but just, that the sheriff should have some notice of rent being in arrear; and perhaps he would not be considered a wrong-doer, in causing goods to be removed in the total absence of such notice; but when he is informed of that circumstance, it is sufficient to put him on his guard. It is not necessary that the notice should be given in express and specific terms; for it does not appear to be even required by the terms of the statute.

Mr. Justice BURROUGH.—The plaintiff was the trustee of an outstanding term, in trust for the mortgagees, and to attend the inheritance; he was therefore clearly entitled to maintain the present action. The notice was given by a receiver of the rents of the estates, and was in substance sufficient, as it stated specifically, that a year's rent was due at the *Michaelmas* preceding the distress. A sheriff is required to levy first for the rent, and then for the execution. He cannot satisfy the creditor in the first instance, as the landlord has a security on the whole of the premises, and it would be an act of great injustice to him, if his rent were not first satisfied, as it was due at all events, and previously to the execution. Such rent, therefore, must be first satisfied, and the plaintiff in the execution is entitled to the residue.



1820.  
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COLYER  
v.  
SPER.

Mr. Justice RICHARDSON.—I am also of opinion that there is no ground for either of these objections. In the first place, the plaintiff stands in the situation of assignee of the reversion. The premises were demise~~d~~ by *Woodroffe* to *Pannell*, in 1811, and afterwards assigned by the former to the plaintiff, in trust. Secondly, no specific form of notice of rent being due is required, as it is only given for the purpose of establishing the sheriff's knowledge of the landlord's claim; and here he was apprized that rent was due. Thirdly, the defendant was guilty of a breach of the statute, by removing any of the goods, after he was informed that there was a claim made for rent. A landlord is not bound to watch a sheriff's officer, to see whether any property will remain after the execution creditor is satisfied. Besides, he could not interfere while the officer continued in possession; and it appears perfectly clear from the terms of the statute, that the sheriff, or his officer, is required, in the first instance, to raise a sufficient sum to pay the landlord his rent, and then, to satisfy the claim of the party at whose instance the execution is sued out.

Rule Refused (a).

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(a) But, where a sheriff, with knowledge that there was rent due to the landlord, proceeded to sell the tenant's goods, without retaining a year's rent, it was decided, that he was liable to an action, although no specific notice had been given to him by the landlord. *Andrews v. Dixon*, 3 Barn. & Ald. 645; and the Court there observed, that the notice to the sheriff is only for the purpose of establishing beyond doubt, his knowledge of the landlord's claim;—that if that knowledge could by any other means be brought home to him, at any time before he had parted with the money, he would be liable.

1820.

TATHAM, Demandant; BAXENDALE, Tenant; TABOR  
and Wife, Vouchees.

Tuesday,  
June 6.

MR. Serjt. *Hullock* moved, that the appearance of the tenant named in the writ of entry in this recovery, might be recorded as of this Term, and that the warranty of the vouchees might be also duly entered, and the recovery pass, although the acknowledgment and affidavit of the caption of the warrant of attorney had been written on paper instead of parchment. It appeared by affidavits, that the vouchees resided at *Rotterdam*, and that, in the last Term, a writ of *dedimus potestatem* was directed to Commissioners there, for the purpose of taking the acknowledgment of the vouchees to a warrant of attorney for suffering a recovery of lands in *Middlesex*; that the copy of the *præcipe* and warrant of attorney, as well as the affidavit of acknowledgment, to be sworn before one of the Commissioners, were made out, and written on parchment, in the usual manner, pursuant to the rule 14 *Geo. 3. (a)*, and forwarded to such Commissioners, with instructions for them to use those same documents, and directing the manner in which the acknowledgment was to be taken; that the Commissioners refused to

The necessary documents for taking the acknowledgment of a recovery in *Holland*, were engrossed on parchment, and sent to Commissioners there. By the law of that country, all documents bearing the certificate of a Dutch notary, require a Dutch stamp, which can only be imprinted on paper. The documents were accordingly returned, written on paper so stamped, and certified:—Held, that the acknowledgment and proceedings so written on paper, could not be allowed; but the Court enlarged the return to the *dedimus*, and permitted the writ to be resealed, in order to endeavour to get the documents properly executed

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(a) By which it is ordered, that “no common recovery, wherein the tenants or vouchees, or any of them, shall appear and defend by attorney, shall be arraigned at the bar, unless an affidavit in writing, on parchment, shall be made and annexed to a copy of the *præcipe*, and warrant of attorney acknowledged by such tenants or vouchees, by virtue of any writ of *dedimus potestatem*, and which affidavit must be filed in the office of enrolment of writs for fines and recoveries.”

on parchment, and returned during the Term, which was accordingly done, when the recovery was permitted to pass in the usual way.

1820.  
TATHAM,  
Demandant.

act on them, but had them re-copied on paper, stamped with a *Dutch* stamp, and certified by a *Dutch* notary;—as according to the practice and laws of *Holland*, every instrument executed in that country, must be stamped with a *Dutch* stamp, which could only be impressed on *Dutch* paper, and the notary refused to certify on the documents which had been transmitted from this country, and written on parchment.

The learned Serjeant submitted, that although, by the practice of this Court, it was usual for the *præcipe* and warrant of attorney to be engrossed on parchment, yet that no rule absolutely required it, and that, although it was held, in *Mander*, Demandant, *Hookney*, Tenant, *Green*, Vouchée (a), that an affidavit of the taking of the acknowledgment, must be engrossed on parchment, according to the rule 14 *Geo. 3.*, still, that that rule did not apply to the former documents, and more particularly so, as the *Dutch* notary would not certify, or affix a notarial stamp on instruments of this description.

But the Court recommended further endeavours to be resorted to, in order to get the proceedings written on parchment, and returned during the Term, and observed, that the return to the *dedimus* might be enlarged, and the writ re-sealed, although it was returnable on the first day of this Term. That all these proceedings were matters of record, and that the acknowledgment could not be re-executed, nor could the practice of the Court be so far relaxed, as to allow it to be written on paper, as no instance could be found where a recovery had been allowed to pass under such a defect,

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(a) 5 Term. 263.

which was, in point of strictness, not only contrary to the established practice, but the rule of Court.

1820.

TATHAM,  
Demandant.

The learned Serjeant, therefore, took nothing by his motion (a).

(a) The documents were, shortly after this motion, returned to the Commissioners, with instructions to get them copied on *Dutch* parchment, or vellum, which was done, and the necessary *Dutch* stamp was affixed to the affidavit, when they were returned to this country, and the recovery was then completed in the usual manner.—The *Dutch* notary, however, annexed his certificate to the affidavit of acknowledgment, instead of indorsing it according to the usual practice; but the Vice-Consul having certified at the foot thereof, that the notary was not allowed, by the law of *Holland*, to indorse or write his certificate upon any official document, the officer allowed it to pass.

In *Palmer*, Plaintiff, *Morgan*, Deforciant, *ante*, page 162, it was held, that the affidavit of taking the acknowledgment of a fine in *Russia*, must be engrossed on parchment, and the affidavit was sent back to be re-sworn. In *Balch v. Phelps*, 3 *Bos. & Pul.* 366, it was determined, that in a joint fine by several persons, the acknowledgments could not be taken, some upon one piece of parchment, and some upon another; and in *Jennings v. Vernon*, 3 *Bos. & Pul.* 361, it was held, that where different vouchees acknowledged several warrants of attorney on the same piece of parchment, it would not support a joint voucher. So, in *Lang v. Lee*, 1 *Bos. & Pul.* 31, it was decided, that where there are several vouchees, the warrant of attorney for each, may be on separate pieces of parchment.

1820.

Saturday,  
June 10.

BUTTS and Others, Assignees of MARK FOSSETT,  
HENRY COOPER, and EDWARD HOWARD, Bankrupts,  
v. SWAN, CHAPPELL, and HEYWOOD.

By 55 Geo. 3. c. 184, Sched. part 1, orders for the payment of money out of any particular fund which may or may not be available, or upon any condition or contingency which may or may not be performed, are to be placed on the same footing as bills of exchange.—  
Therefore, a letter from A. to B. requesting him to pay C. and Co. or their order, £600, out of the first proceeds of a stock of gunpowder, then in the hands of B. and to charge the same to the account of A.—although followed by a subsequent correspondence between the parties, was held to require a stamp, as an order for the payment of money within the provisions of that statute, and consequently that an agreement stamp affixed on payment of a penalty, was improper.

In *trover* by the assignees of a bankrupt, for goods alleged to have been placed in the hands of the defendants for sale, by the bankrupt, before his bankruptcy, and on his account; and the defendants, in order to prove that the goods had been pledged by the bankrupt to C. and Co. for the repayment of money advanced to him thereon, and that the defendants had become legally responsible to them for the money to be produced by the sale. *Quære*, whether a partner in the house of C. and Co. be admissible as a witness for the defendants, to shew under what circumstances the advances were made by that house to the bankrupt?

THIS was an action of *trover* for a quantity of gunpowder. The defendants pleaded Not Guilty; on which issue was joined. The cause came on for trial, before Lord Chief Justice Dallas, at the Sittings at Guildhall, after the last Hilary Term, when the Jury found a verdict for the plaintiffs, damages, 321*l.* subject to the opinion of the Court on the following case:—

A commission of bankrupt, dated 8th July, 1817, was duly issued, on the petition of the plaintiff Butts, against the three bankrupts, who before, and at the time of their bankruptcy, carried on trade together as gunpowder manufacturers, near Tunbridge. Howard committed an act of bankruptcy in July, 1816; Fossett, on the 23d May, 1817; and Cooper, on the 25th May, in that year.

On the 26th of July, 1817, an assignment of the estate and effects of the bankrupts was duly executed by the Commissioners, to the plaintiffs.

The defendants were commission merchants in *Liverpool*, and had been entrusted with gunpowder by the bankrupts, before their bankruptcy, to be sold on their account.

The present action was brought to recover the value of eighty-four barrels of gunpowder belonging to the bankrupts, which were in the hands of the defendants on the 8th of July, 1817, when the commission issued against *Fossett*, *Cooper*, and *Howard*.

1820.

BUTTS

v.

SWAN.

On the 13th of *October*, 1817, and before the commencement of this action, the plaintiffs demanded the gunpowder from the defendants, and at the same time offered to pay them any legal charges which they might have in respect thereof;—but the latter refused to deliver it, to the plaintiffs, and sold it before the action was commenced.

On the part of the defendants, a person by the name of *John Cooper* was called as a witness, who swore, that he in *August*, 1816, and from thence, was a partner in the house of *Henry Cooper and Son*, and that, in that month the bankrupt *Fossett*, requested a loan from them of a sum which, with 280*l.* already advanced by them to him, would amount to 600*l.*; that they refused to lend him the money unless the defendants would undertake to re-pay the whole 600*l.* out of the powder in their possession; that, on the 28th of *August* following, *Fossett* came with *Heywood* (one of the defendants), to *Henry Cooper and Son*, and said, “I have brought *Heywood* to you to engage to pay you 600*l.* out of the first proceeds of the gunpowder belonging to us, in the hands of himself and his partners, if you will advance my firm the money;” that the witness said, “if *Heywood* will undertake to re-pay me the 600*l.*, I will give you the remainder of the money;” *Heywood* then said, “I will pay you out of the first proceeds;” the witness then asked for a written engagement to this effect, but *Heywood* said, “that he would write to his partners at *Liverpool*, to confirm it, so that it might come through the house;” that the witness, on account of himself and partner, on the 31st of *August* last, advanced 320*l.* to *Fossett*, on account of his firm; that this advance was made

820.  
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 BUTTS
 v.
 SWAN.

on the faith of a written engagement. That 80*l.* was re-paid by the defendants, to *Henry Cooper and Son*, in *June*, 1817, before the issuing of the commission, from the proceeds of the powder sold by the defendants, before that time, and that the remainder of their debt is still due from the bankrupts.

The competency of this witness was objected to, on the part of the plaintiffs.—The defendants then gave in evidence the two following instruments, each stamped with a one-pound stamp, subscribed respectively by the bankrupt *Mark Fossett*, for the firm of *Mark Fossett and Co.*, and by the defendants; and which were delivered to the parties to whom they were addressed, according to the course of post, from their respective dates. Neither of these instruments, had any stamp at the time of being written, but, before the trial, each was stamped with a one-pound agreement-stamp, on the payment of a penalty.

“ London, 29th August, 1816.

“ Messrs. Swan and Heywood.

“ Gentlemen,

“ We request that you will pay to Messrs. Henry Cooper and Son, or their order, out of the first proceeds that become due of our stock of gunpowder now in your charge, six hundred pounds, and charge the same to our account. We remain, Gentlemen, your most obedient servants,

“ Mark Fossett and Co.”

“ Liverpool, 2nd October, 1816.

“ Messrs. Henry Cooper and Son.

“ Gentlemen,

*“ We have received Messrs. Mark Fossett and Co.’s letter, of the 29th August last, directing us to pay to you, or your order, 600*l.* out of the first proceeds of their stock of gunpowder now in our charge, and we have also their letter of the same date, directing us to pay to Mr. Augustus Hughes,*

or his order, 200*l.* out of the proceeds of the said stock. These sums we can have no objection to pay as directed, provided we shall be in funds for the purpose, subject, however, in the first place, to the payment of our advances, interest, and commission, on the said consignment. We are, Gentlemen, your obedient servants,

"Swan and Heywood."

It was objected, on the part of the plaintiffs, that these instruments could not be read in evidence, as there was no stamp upon them at the time they were written, and that they were not properly stamped. But the Chief Justice allowed them to be read in evidence, saving the plaintiffs the point, whether they ought to have been admitted. The following letters, none of which were stamped, were also read in evidence, on the part of the defendants.

"London, 27th September, 1816.

"Messrs. Swan and Heywood.

"Gentlemen,

"Messrs. Henry Cooper and Son are surprised that you have not noticed the letter written by us to you in their favour, dated 29th *August* last, and which Mr. *Heywood*, when in town, promised should be done, but wished it to be passed through the house. You have also one of the same nature for Mr. *A. Hughes*. We beg your attention to our request, that you will forward them by return of post to those gentlemen; and, at the same time, we shall be obliged by receiving our account current with you. We are, Gentlemen, your most obedient servants,

"Mark Fossett and Co."

"Liverpool, 16th December, 1816.

"Messrs. Mark Fossett and Co.

"We request you will have the goodness to inform us, whether we are to consider the undertaking given by us to Henry Cooper and Son, and Mr. Hughes, still in force,

1820.

W
BUTTS
v.
SWAN.

which binds us to apply the whole proceeds of the stock in our hands, in the first instance to pay them, or whether our acting contrary to this arrangement will not be improper? Our only motive for this precaution is, to keep clear of blame from all parties. We are, &c.

" *Swan and Heywood.*"

" *London, 23rd April, 1817.*

" *Messrs. Swan and Heywood.*

" Gentlemen,

" Confirming our letter of the 29th of *August* last, requesting you to pay out of the proceeds of our stock of gunpowder, to Messrs. *Henry Cooper and Son*, 600*l.*, and to Mr. *Augustus Hughes*, 200*l.*, we have now to request, that you will pay the balance, when realized, to Mr. *Joseph Searle*, of *Fetter Lane, London*, and place the same to our account. We are, Gentlemen, your most obedient servants,

" *Mark Fossett and Co.*"

" *Liverpool, 22nd August, 1817.*

" *Mark Fossett, Esq.*

" Dear Sir,

" We have now the pleasure to enclose our account current to 31st *December* last; balance to your credit, 76*l.* 1*s.* 7*d.*, which sum, upon your confirming the account, we will immediately remit to Messrs. *Henry Cooper and Son*, agreeably to your letter of the 29th of *August*, 1816.

" The sales of gunpowder made by *Swan, Chappel*, and *Heywood*, up to the present time, amount to 140*l.* 17*s.* 9*d.*; but no part of this sum is yet due from the purchasers, when received, it shall be remitted in the same manner to the parties whom you have instructed us to pay over these proceeds to. We remain, Dear Sir, your obedient servants,

" *Swan and Heywood.*"

" P. S. We have received a letter from Mr. *Searle*, enclosing your letter of the 23rd of *April*, directing us to

pay over to that gentleman the balance of your account, after paying the 600*l.* to *Cooper and Son*, and 200*l.* to *Mr. Hughes*. In consequence of the great decrease of the price of gunpowder, we are afraid your stock will scarcely realize sufficient to pay your engagements with those gentlemen, and therefore, it would only be misleading *Mr. Searle* to hold out any expectation of his getting a balance. We shall wait your reply before we address *Mr. Searle*.

“*Swan and Heywood.*”

The question for the opinion of the Court was, whether the plaintiffs were entitled to recover the said sum of 321*l.*, or any part thereof? and a verdict or nonsuit was to be entered accordingly, and either party was to be at liberty to turn the case, into a special verdict, to be so framed as to raise the question upon the admissibility of the evidence.

The case came on for argument this day, when *Mr. Serjt. Vaughan*, for the plaintiffs, submitted, first, that whether the defendants had a lien on the gunpowder or not, depended chiefly on the parol evidence given by *Cooper* at the trial, whose testimony ought not to have been admitted, as he was interested in the event of the suit. Secondly, that even if his evidence were admissible, it only went to shew the inception of the contract, which was afterwards to be embodied in a written agreement, and on the faith of which instrument the advance was made. Thirdly, that the engagement was not binding, as it amounted to a promise to answer for the debt of another, and was void by the statute of frauds. And lastly, that the letter of the 29th of *August*, 1816, was an order for the payment of money, within the 55 *Geo. 3. c. 184. Sched. Part I. tit. Inland Bill of Exchange(a)*,

(a) By which all bills, drafts, or orders for the payment of any sum of money, out of any particular fund which may or may not be available, or upon any condition or contingency which may or may not be performed, or happen, if the same shall be made payable to the bearer,

1820.

BUTTS

v.
SWAN.

1820.

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 BUTTS
 v.
 SWAN.

and not receivable in evidence, it being stamped with an agreement-stamp after it was issued. In support of the last objection, he submitted, that, in point of fact, it amounted to a bill of exchange, as it was dated, and addressed to the defendants by the bankrupts, by whom it was signed, requesting the former to pay 600*l.* to *Cooper and Son*. It was therefore intended to be negotiable, although no express time was stipulated in the body of it, when the first proceeds of the powder would become due. It was clearly payable out of a fund which might, or might not, be available, and to *Cooper and Son, or their order*. By the eleventh section of 55 *Geo. 3.*, it is enacted, that "if any person shall make, sign, or issue, or accept or pay, any bill of exchange, draft, or order for the payment of money, liable to any of the duties imposed by that act, without the same being duly stamped for denoting the duty thereby charged thereon, he shall, for every such bill, draft, or order, forfeit 50*l.* Here, it appears, the order had no stamp affixed to it, at the time it was written or issued; and it does not fall within the tenth section of that statute, by which, instruments having wrong stamps, but of sufficient value, shall nevertheless be deemed valid;—as by that clause, those cases were excepted, where stamps were specially appropriated to any instrument, by having its name on the face thereof, which is always required on bills of exchange, and instruments of a like description. By the 31 *Geo. 3. c. 25. s. 19.* (to which 55 *Geo. 3. c. 184. s. 7.* refers), it was provided, that it should not be lawful for the Commissioners, or their officers, to stamp any bill or note after it was made or drawn. The case of *Firbank v. Bell* (a) is stronger than the present, where an agreement-stamp affixed

or to order, or if the same shall be delivered to the payee, or some person on his or her behalf, shall be deemed and taken to be inland bills, drafts, or orders for the payment of money, within the intent and meaning of that Schedule.

(a) 1 *Barn. & Ald.* 36.

to one of several letters, the first of which, operated as an order for the payment of money out of a contingent fund, was held improper, and to fall within the statute 55 Geo. 3. c. 184. There, too, the proceeds of the sale were merely to be paid over to Messrs. *Pease* and Co. and not as in this case to Messrs. *Cooper* and Son or their order. The letter in question therefore, was not admissible in evidence at the trial, as it was improperly stamped, and the plaintiffs are consequently entitled to judgment.

1820.

BUTTS

v.

SWAN.

Mr. Serjt. *Hullock*, for the defendants, contended, first, that *Cooper* was an admissible witness. If a verdict had been found for the defendants, he could not avail himself of it so as to give it in evidence in support of his own claims; nor, could a verdict be used in evidence against him in case of the failure of the defendants. That is the only test by which his competency or incompetency can be proved. It is true, that in an action against a master for the negligence of his servant, the latter is not a competent witness to disprove his own negligence, as the verdict may be given in evidence in a subsequent action by the master against the servant as to the *quantum* of damages. In *Bent v. Baker* (a) Lord *Kenyon* said, that "the objection was, that the witness was an underwriter in the same policy;" but he observed, that "the principle was, that if the proceeding in the cause could not be raised for him, he was a competent witness, although he might entertain wishes on the subject, for that only went to his credit, and not to his competency." *Nix v. Cutting* (b) is stronger than the present, where, in trover for a horse, a person who accepted it as security for the payment of a sum of money, and afterwards on default, sold it to the defendant, was deemed competent to prove these facts.—[Lord Chief Justice *Dallas*.—If the defendants had obtained a verdict through the testimony of *Cooper*, they must have admitted

(a) 3 Term Rep. 27.—(b) 4 Taunt. 18.

1820.

BUTTS

v.

SWAN.

that they retained the powder for *H. Cooper and Son*, and if they had brought an action against the former, would not such verdict be available in evidence, to shew what was done, although it might have no express effect in itself, viz. that they held for *Cooper and Son*? The main question, however, here is, whether the letter of the 29th of August was properly stamped. The parol undertaking appears to me, to be merely an inception of that which was to be confirmed by a subsequent agreement.]—The letter, if taken *per se*, although it may be within the 55 Geo. 3. c. 184. Sched. Part I. was still admissible in evidence, with the stamp which appeared to be affixed to it at the trial; as it neither constituted a bill of exchange, or an order for the payment of money, and therefore only required an *ad valorem* stamp within the meaning of that statute. If an action had been commenced on that instrument, it could not be treated as a bill of exchange, but should have been declared on specially as an agreement. An order to pay money out of rents is not a bill of exchange, because the person to whom it is addressed may not have rent or other money in his hands sufficient to discharge it. *Jenney v. Herle (a)*. If, therefore, the letter could not be declared on as a bill or order for the payment of money, it does not fall within the provision of the 31 Geo. 3. c. 25. requiring bills to be stamped at the time they are made. By the 55 Geo. 3. it was expressed that certain instruments should be deemed and taken to be bills or orders for the payment of money within the meaning of the schedule. But the meaning of that statute in classing instruments of this description among bills of exchange, was not to make that a bill which never could become so, but merely to answer the purposes of the revenue. It was therefore subjected to an *ad valorem* duty only, although it was comprehended in that schedule as falling within the denomination of a bill of exchange; and if it be

(a) 3 Lord Raym. 1361. S. C. 1 Stra. 591.

construed in a strict and legal sense, it can neither be deemed applicable to an instrument in the nature of a bill of exchange, or an order for the payment of money within the 51 Geo. 3. c. 25. It therefore might be stamped with an *ad valorem* stamp after it was drawn; and although the 55 Geo. 3. requires it to be stamped as a bill of exchange, it still leaves the character of the instrument as it stood before that statute was passed. Besides, the letter in question was only a memorandum of an agreement connected with the subsequent correspondence that took place between the parties. This case, therefore, is distinguishable from *Firbank v. Bell*, where Lord Ellenborough observed (a), that "the order was the only thing by which the bankrupt was personally implicated; for that he was not a party to the other letters. That the order alone affected the bankrupt, and that that amounted to nothing more than an order for payment." Here however, there were subsequent letters written by the bankrupts, confirmatory of the first;—at all events, the letter from the defendants to *Cooper and Son* of the 2d of October, formed part of the agreement, but in point of fact, the whole of the correspondence must be looked at and taken together, as constituting one agreement; and, by the statute 55 Geo. 3. c. 184. Sched. Part I. (b) it is provided, that "where divers letters shall be offered in evidence to prove any agreement between the parties, who shall have written such letters, it shall be sufficient if any one of them be stamped." Here, both the letters, as forming the primary part of the correspondence, were stamped, by which the purposes of the revenue were fully satisfied. If an action had been commenced on the first letter alone, treating it as an order for the payment of money, it should have been averred that the defendants had funds in their hands belonging to the bankrupts. It therefore was not an unqualified order, as if they had no funds, or if they had been exhausted, they could not have been called on to pay,

1820.

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 BUTTS  
 v.  
 SWAN.

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(a) 1 Barn. & Ald. 39. ——— (b) Tit. Agreement.

1820.

Butts

v.

Swan.

nor was it a bill of exchange, as such funds were altogether uncertain. In the course of a mercantile correspondence, a single letter may be selected as forming an order for the payment of money, but the principle to be observed is, that the whole of the correspondence must be taken together, as substantially forming and constituting one entire agreement.

Mr. Serjt. *Vaughan*, in reply.—The only question now is, whether the letter of the 29th of *August*, is an order for the payment of money, within the 55 *Geo. 3. c. 184*, and requiring a similar stamp to bills of exchange, within the Schedule, Part I, of that statute, or whether it be only subject to an *ad valorem* stamp as an agreement contained in a series of letters within that statute? Although it may be taken in conjunction with the subsequent letters that passed between the parties, it still required a stamp as an order for the payment of money. It was complete the moment it was written and issued, and if it could be stamped afterwards, the object of the statute would be entirely defeated, as instruments of this description would be invariably written on plain paper, and stamped only in cases where it is necessary to give them in evidence before a jury.

Lord Chief Justice *DALLAS*.—This case having been narrowed to one point, it is unnecessary to consider the others which have been raised in the course of the argument, and the single question now is, whether the instrument adduced at the trial, of the 29th of *August*, 1816, was properly stamped or not, as required by the 55 *Geo. 3. c. 184*. Sched. Part I, tit. *Bill of Exchange*. It has been admitted, that if this instrument amounted to a bill of exchange, it could not be stamped after it had once issued, and that, even if it were an order for payment of money, it would require the same stamp, and fall within the principle of a bill of exchange within the provisions of that statute. Does it therefore stand on a different footing from a bill of exchange? By the 55 *Geo. 3.* certain stamps are

imposed on bills of exchange, drafts, or orders for payment of money to the bearer or order. These instruments are mentioned and classed together, and in the same schedule, imposing the duty on them, it is specified, that "all bills, drafts, or orders, for the payment of any sum of money out of any particular fund, which may or may not be available, or upon any condition or contingency which may or may not be performed or happen, if the same shall be made payable to the bearer, or if the same shall be delivered to the payee, or some person on his or her behalf, it shall be considered as bills of exchange, or orders for the payment of money within the Schedule of the act." It seems to me, that the general provisions of the statute apply to this instrument, which is thereby put on the same footing as bills of exchange, or orders for the payment of money;—no distinction can be drawn between bills or orders for payment of money out of any particular fund which may or may not be available, and bills given for a specific sum, and payable on a given day. Without saying that the statute was intended to alter the nature or quality of orders payable on a contingency, still, on taking the whole of it together, I think it is quite clear that they were intended to be treated as ordinary bills of exchange. But this case is not to be distinguished from that of *Firbank v. Bell* (a), where the order was given by the bankrupt to the defendants, who were requested "when a cargo of mahogany, per *Regent*, was sold, to pay over to Messrs. *Pease* and Co. 1500*l.* in such bills as they might receive from the sale;" and it was there decided, that that instrument should have been stamped, as being an order for the payment of money, out of a fund which might or might not be available within the meaning of the statute. So, here, the defendants were requested to pay to *Cooper and Son* or their order out of a particular fund which is prospective and contingent. The case of *Firbank v.*

1820.

  
 BUTTS  
 v.  
 SWAN.

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(a) 1 *Barn. & Ald.* 36.



1820.

BUTTS

v.

SWAN.

*Bell* is even stronger than the present, for here, the gunpowder was in the hands of the defendants at the time the order was given;—there, *Pease and Co.* wrote to the defendants a letter enclosing the order in the following terms: “We beg your attention to an order we have received from Mr. *Mann* upon you, for the payment of 1500*l.*, when you have effected the sale of his mahogany, per the *Regent*,” in answer to which, the defendants acknowledged the receipt of the letter and order, and said “they should attend to it immediately after paying themselves 3000*l.*, which they were previously in advance;”—That case therefore, is precisely similar to the present, for it did not consist in a single order to pay money out of a future fund which might or might not be available, but on two letters, the one containing, and the other acknowledging the receipt of the order; and in delivering the judgment of the Court, Lord *Ellenborough* said, “there is nothing to which the name of an agreement can be given, if you do not pray in aid the order; that is the only thing by which the bankrupt is personally implicated, for he is not a party to the other’s letters.” Still, however, a distinction was there attempted to be drawn, as in this case, as to the subsequent letters.—Let us now examine, whether this case be distinguishable from that, either in point of circumstance or principle. Lord *Ellenborough* there proceeded to observe, that “the order alone affects the bankrupt, and that amounts to nothing more than an order for payment. It falls, then, within the description of the act of parliament, namely, an order for the payment of money out of a fund which may or may not be available.” That is precisely the effect of the instrument in this case, and his Lordship then went on to say, “it was the object of the legislature in framing this provision, to treat as promissory notes and bills of exchange, and to subject to a stamp duty, such instruments, as being payable on a contingency, or out of a particular fund, could not in strictness fall under that denomination.” So here, on advertent to the distinction which exists, independently of the statute, between bills

of exchange and orders payable at all events, or on a contingency, yet, they are both placed on the same footing as to the stamps, and the times at which they must be affixed. All that now remains to be examined is, whether, on principle, this instrument required a similar stamp to the order in the case of *Firbank v. Bell*, the letters there were not taken to be in conjunction with the order by the bankrupt, and constituting one agreement; there is therefore a fallacy in the argument, that the subsequent correspondence in this case must be so considered. There, the order was absolute and complete when it issued. Every order is not meant to operate as an agreement, nor does it, for an order may be for the payment of a sum of money on a contingency, but still it is complete when it is issued, and does not depend on whether the other party afterwards assented to its adoption or not, but here, the order was absolute and complete the moment it issued, if not, the subsequent correspondence might have tended to defeat it, but such correspondence does not even vary the order in any way whatever. It therefore, ought to have had the proper stamp affixed to it when it was issued, and as the order was equally absolute as that in *Firbank v. Bell*, although here, there was a subsequent correspondence between the parties, still, as the original order was not properly stamped, and as it stood on the same footing as bills of exchange, payable at a given time, I think it was not admissible in evidence at the trial.

1820.

Butts  
v.  
Swan.

Mr. Justice PARK.—In order to come to a conclusive opinion in this case, it is not necessary to examine the point raised at the bar as to the admissibility of *Cooper* as a witness; on that question, therefore, no opinion whatever need be given. I agree, that if this order had been merely preparatory, or not reduced into writing, parol proof might have been admissible, but when it is absolute, and in writing, there is an end of such proof, and the only question therefore is, whether the instrument, as

1820.

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 BUTTS  
 v.  
 SWAN.

adduced in evidence at the trial, was properly stamped or not. It has been admitted by my Brother *Hullock*, that it will not fall within the provision of the statute, unless it can be considered as a bill of exchange. Although it does not amount to a bill or order, according to old authorities, or was considered as such in prior cases, it being made payable on a contingency; still, by the 55 *Geo. 3. c. 184*, it was the clear intent of the legislature to make an instrument of this description, subject to a stamp, similar to bills of exchange payable at a specific time, and for a given sum. Before that statute, orders for the payment of money out of a particular fund, which might or might not be available, were not considered as legal orders, but they are now placed on the same footing, as orders given for the payment of money at all events. Lord *Ellenborough* considered it so in *Firbank v. Bell*, because, he being fully aware, that the order there could not amount to a legal order according to the previous statutes and decisions, said, "it was the object of the legislature in framing this provision, to treat as promissory notes and bills of exchange, and to subject to a stamp duty, such instruments, as being payable on a contingency, or out of a particular fund, could not, in strictness, fall under that denomination." That case, therefore, goes the whole length of the present. As to the subsequent letter on the 23rd of *April*, 1817, confirming the original order, I think, for the reasons assigned by my Lord Chief Justice, it will not alter the case, for the only question is, whether the instrument of the 29th of *August*, 1816, was, in its inception, an order for the payment of money, I am of opinion that it was, and consequently, that its effect could not be altered by the subsequent correspondence.

Mr. Justice BURROUGH.—By the former statutes, bills of exchange, as well as promissory notes, drafts, or orders for payment of money, were required to be stamped before they were signed by the parties, and the only question here is,

whether the 55 Geo. 3. c. 184. Sched. Part I, which has stated the particular stamps to be required on inland bills of exchange, adopts the clauses of the former statutes, which require such instruments to be stamped at the time of their execution. The 31 Geo. 3. c. 25, contains a sweeping clause (a) that it should not be lawful for the Commissioners, or their officers to stamp any bill or note, after it was made, to which clause the 55 Geo. 3. c. 184. s. 7. refers, as there it was enacted, that the power and provisions of former acts should extend to that statute (b). On a former trial of this cause before me, at the Sittings after Trinity Term, 1818, I directed a verdict for the plaintiff, as it was proved that an agreement stamp had been put on the instrument in question, after it had issued; and I am extremely happy to find that my opinion is now confirmed, not only by this Court, but by the previous case of *Firbank v. Bell*, in which I think Lord *Ellenborough* laid down the principle by which this case must be governed, not only rightly, but with great clearness and perspicuity.

1820.

Bury  
v.  
Swan.

Mr. Justice RICHARDSON.—The points in this case being reduced to one, namely, whether the instrument of the 29th of August was properly stamped or not, it is unnecessary to consider whether the evidence of *Cooper* was admissible at the trial or not, for what he proved had been reduced into a written agreement, on the faith of which the advance was made. Bills of exchange and promissory notes were required to be stamped, by various statutes previous to the 55th Geo. 3. But the order in question could not be considered as requiring a bill stamp under those statutes, still however it is expressly made so by

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(a) S. 19.

(b) And by the 37 Geo. 3. c. 90. duties on bills of exchange, drafts, or orders for the payment of money were increased, and continued in force until the 44 Geo. 3. c. 98. and from that period, the only regulating statute is the 55 Geo. 3. c. 184.

1820.

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BUTTS  
v.  
SWAN.

the latter act, for after the respective duties are there charged on inland bills or orders, it is stated, that the following instruments shall be taken to be bills or orders for the payment of money, within the intent of the Schedule to that act, viz. bills or orders for the payment of money out of any particular fund, which may or may not be available. Although the instrument in question does not amount to a bill of exchange in a commercial point of view, still, it must be considered so for the purposes of the revenue, and as such, cannot be stamped after it is made. My Brother *Hullock* has urged, that the subsequent letters, and the original order constitute but one agreement, and therefore, that this case is distinguishable from that of *Firbank v. Bell*, but, after the 29th of *August*, two letters only were written by the bankrupts, namely, one on the 27th of *September*, which merely refers to the order, and that of the 23rd of *April*, 1817, not only confirms the original order, but requests the defendants to pay the balance when ascertained. That is a complete ratification of the former order, and is consequently subject to the same objection, namely, the want of a stamp. On the whole, therefore, I am of opinion, that neither of these instruments, when adduced at the trial, were properly stamped, and consequently that the assignees are entitled to recover.

Judgment for the plaintiffs.

Mr. Serjt. *Hullock* then applied for a special verdict, as to the admissibility of *Cooper* as a witness, but the Court observed, that the plaintiffs were clearly entitled to recover on the single objection as to the stamp.

1820.

## BROOKE v. ENDERBY and GILPIN.

Saturday,  
June 10.

**THIS** was an action of *assumpsit* for money lent, money paid, had and received, and on an account stated.

The defendant *Enderby*, pleaded the general issue, and *Gilpin* his certificate, under a commission of bankrupt, which was admitted by the plaintiff.—The cause came on for trial before Lord Chief Justice *Dallas*, at *Guildhall*, at the Sittings before the last *Easter Term*, when the Jury found a verdict for the plaintiff for 33*l.* 17*s.* 5*d.* subject to the opinion of the Court on the following case.—The defendant *Enderby*, by indenture bearing date the 24th of *September*, 1807, became a partner with *Gilpin* in the several businesses of woollen draper, army clothier, and army agent, for the term of ten years from the day of the date thereof. Previously to that year, the plaintiff being a Lieutenant-Colonel in his Majesty's service, employed *Gilpin*, the defendant, as his agent, and continued so to employ him until the bankruptcy of the latter on the 1st of *April*, 1819. During such time, the plaintiff kept a running account with *Gilpin*, the latter from time to time receiving the pay and allowances, and also dividends due to the plaintiff on stock and other monies on his account, and from time to time making payments to him or his order: the plaintiff being in the habit of drawing on *Gilpin* as his banker. These dealings and transactions appeared by an account kept by *Gilpin* in relation thereto, a copy of which accompanied this case, and was to be considered a part thereof, and to be taken as proof of the several receipts, payments, and items therein specified. The defendant *Gilpin*, from time to time furnished copies

Where the plaintiff kept a general account with *A.*, as his banker and army agent, and *B.* became a partner with *A.* for a limited period, and retired on its expiration, without the knowledge of the plaintiff, and *A.* afterwards became bankrupt, until which period the account continued between the plaintiff and *A.* :—Held, that payments made by the latter to the plaintiff after the expiration of the partnership, not having been appropriated by him at the time to any particular debt, *B.* might consider such payments as being made in reduction of the balance due at the expiration of the partnership, and that he was not accountable to the plaintiff for any sums received by *A.*

on account of the latter, subsequent to such expiration.

1820.  
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BROOKE  
v.  
ENDERBY.

of the account to the plaintiff. *Gilpin* carried on business in his own name only, and *Enderby* never interfered in it to the knowledge of the plaintiff, nor was he known or suspected by him to be or have been a partner therein, until after the bankruptcy of *Gilpin* on the 1st of *April*, 1819. The plaintiff and *Gilpin* continued to deal together after the 24th of *September*, 1817, down to the period of *Gilpin's* bankruptcy, in the same way as they had before done, and the account between them continued to be kept in the same manner, no distinction being made as to the time before and after the 24th of *September*, 1817, but the receipts and payments prior and subsequent to that period formed part of one general account. No rest was made or balance struck in the account after the 1st of *July*, 1816, when the partnership expired, down to the bankruptcy of *Gilpin*. During the existence of such accounts and dealings, there was at all times a considerable balance due to the plaintiff. No notice of the dissolution or expiration of the partnership between *Gilpin* and *Enderby* was given. The sum of 1773*l.* 9*s.* 4*d.* was paid into Court by *Enderby*, and in calculating the sum to be so paid into Court, he sought credit for all sums paid by *Gilpin* to the plaintiff after the 24th of *September*, 1817, without giving credit for any sums received after that day by *Gilpin* on account of the plaintiff, which sums so received by *Gilpin* on account of the plaintiff after the 24th *September*, 1817, consisted of dividends on stock and canal shares from *October*, 1817, to *January*, 1819, amounting to the sum of 306*l.* 10*s.* 5*d.* The verdict was taken for the amount of such sums of money and interest calculated up to the 20th of *April*, 1820. If the principle on which *Enderby* had calculated the sum paid into Court were correct, it was admitted on the part of the plaintiff, that 1773*l.* 9*s.* 4*d.* so paid into Court by him, covered and satisfied the whole of the plaintiff's demand upon him, with interest thereon.

The question for the opinion of the Court was, whe-

ther the plaintiff was entitled to recover the said sum of 333*l.* 17*s.* 5*d.* or any part thereof? If they should be of opinion in the affirmative, the verdict was to stand, or be reduced as the Court should direct, otherwise, a nonsuit was to be entered.

1820.  
BROOKS  
v.  
ENDERBY.

The case came on for argument this day, when Mr. Serjt. *Hullock* for the plaintiff submitted, that the above sum of 333*l.* 17*s.* 5*d.* constituted a debt due to him during the existence of the partnership between the defendants, and that it had not at any time been discharged. *Enderby* cannot now avail himself of his situation as a dormant partner, and take credit for the payments made by *Gilpin* on the plaintiff's account, without at the same time debiting himself for the sums received for the plaintiff by *Gilpin* since the expiration of the partnership. Although *Enderby* was unknown to the plaintiff to be a partner with *Gilpin*, he was equally liable. The plaintiff dealt with *Gilpin* as with a banker, and a person paying money may appropriate it to any particular debt, but if he does not do so at the time, the creditor, at any subsequent period, when an event may occur to raise a different state of things between the parties, may apply it to any part of his demand which he pleases: *Newmarch v. Clay* (a). *Gilpin*, therefore, not having specifically appropriated any of the payments to discharge the old balance, the plaintiff is at liberty to apply the same in discharge of the subsequent receipts, in which case, the sum now demanded by him remains due. The rules laid down by the Master of the Rolls in *Clayton's* case (b) as to the settlement of cash accounts, viz. that "in the absence of a declaration by either party as to the application of indefinite payments, the law made the appropriation according to certain rules of presumption depending on the nature of the debts, or the priority in which they were in-

(a) 14 *East*, 239. — (b) 1 *Merie*, 603. *et seq.*



1820.

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 BROOKE  
 v.  
 ENDERBY.

tured, and that, if any other appropriation was made, it was incumbent on the creditor to declare his intention at the time of payment," are not strictly applicable to the present;—it being evident, that the plaintiff as creditor, had not the means of treating these accounts as distinct, although his debtor, *Enderby*, was enabled to do so at the time of the expiration of the partnership. There, too, it was the case of a banking account, and the question arose after the death of one of the partners, and the creditor continued to deal with the surviving partners with a full knowledge of that circumstance, and without making any appropriation at the time of the death. Here, however, the plaintiff was entirely ignorant of the partnership of the defendants, or its expiration, and had therefore no right of election.

Mr. Serjt. *Bosanquet*, for the defendant *Enderby*, was stopped by

The Court, who were clearly of opinion, that *Clayton's* case was not only applicable to, but must govern the present, as in point of principle it stood precisely on the same ground. Here, too, at the expiration of the partnership, a balance was due from *Gilpin* to the plaintiff; and it appears that *Enderby* has paid into Court more than a sufficient sum to satisfy the plaintiff's demand at the expiration of the partnership.

Judgment of Nonsuit (*a*).

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(a) See also *Bodenham v. Purchas*, 2 Barn. & Ald. 39, where Mr. Justice Bayley observed, *id.* 45, that the decisions in Courts of law do not break in upon the distinction taken in *Clayton's* case, and that the principle established by these decisions is, that where there are distinct accounts and a general payment, and no appropriation made at the time of such payment by the debtor, the creditor may apply such payment to which account he pleases; but that, where the accounts are treated as one entire account by all parties, that rule does not apply; and Mr. Justice Abbott said, that *Clayton's* case was decided upon great consideration, and was an authority of great weight; and Mr. Justice Holroyd added, that it was decided on the soundest principles, and governed the case of *Bodenham v. Purchas*.

1830.



TOMLINSON and WHITE v. SHYNN.

Monday,  
June 12th.

MR. Serjt. *Laves*, in the last *Michaelmas* Term, had obtained a rule calling on the Sheriff of *Essex*, to shew cause why he should not pay over to the plaintiffs or their attorney, 5*l.* 6*s.* 6*d.* being the sum returned by him on a writ of *feri facias* issued in this cause, to be in his hands, ready to be paid to the plaintiffs, and that he might pay the costs of the application. The motion was founded on affidavits, which stated that a writ of *feri facias* was issued against the defendant at the suit of the plaintiffs on the 3d *May*, 1819, directed to the Sheriff of *Essex*, and indorsed, to levy 171*l.* against the effects of the defendant. That the Sheriff levied accordingly, and returned, that he had made of the goods of the defendant 106*l.* 2*s.* 6*d.* 50*l.* part whereof, he had retained for the landlord of the premises for one year's rent; that he had retained 2*l.* 16*s.* for his poundage, and that he had the residue, amounting to 5*l.* 6*s.* 6*d.* ready to be delivered to the plaintiffs. It appeared that the warrant under the *feri facias* was received by the sheriff's officer at *Chelmsford*, on the 4th of *May*, and that he went to levy on the same day. That he found that a person by the name of *Cohen* had possessed himself of the defendant's effects early in the morning of the preceding day, under a deed of assignment previously executed by the defendant to *Cohen*, for the purpose of securing to him the payment of 150*l.* due from the defendant to *Cohen*, who kept possession of the goods, and ordered them to be sold, which was accordingly done on the 10th and 11th of *May*. Previously to the sale, it was verbally agreed between *Cohen* and the officer, that the former should, in the first instance, sell a sufficient part of the defendant's property to pay off his own demand of 150*l.* together with the expenses of the sale, and that the residue should be sold for the sheriff under the execution at the suit of the plaintiffs, and

Where a sheriff returned, to a writ of *feri facias*, that he had money in his hands ready to be paid over to the plaintiffs, whereas it had been paid over, through the misconduct of his officer, to the solicitor of a commission of bankrupt, issued against the defendant (the original debtor) and under which commission one of the plaintiffs was appointed assignee, who knew and did not object to such payment: Held, that this amounted to an assent on the part of such plaintiff to ratify the payment, and consequently that the sheriff was not liable to pay over to the plaintiffs the sum which he stated to have received for them in his return.

1820.

TOMLINSON  
v.  
SHYNN.

that the net proceeds thereof should be paid over to the officer on their behalf, and on this understanding the sale proceeded, and the sheriff accordingly, on the faith of this promise, returned that he had received the sum in question. On the 8th of *May* a docket was struck against the defendant, a commission issued on the 13th, and the plaintiff, *White*, was chosen one of his assignees. On the 14th of *June*, *Cohen*, after deducting the 150*l.* due to him, paid over the balance to the solicitor to the assignees under the defendant's commission, who was appointed by the plaintiff *White* and the other assignee, and not to the officer as he had promised, but such payment was made without the privity of *White*; and a few days afterwards an action was commenced against *Cohen* in the name of the assignees, to recover the money retained by him in satisfaction of his own security. The rule was enlarged until this Term, in order to ascertain the event of the action against *Cohen*, in which the assignees were nonsuited, being unable to establish the petitioning creditors' debt, and trading of the defendant.

Mr. Serjt. *Pell* now shewed cause on behalf of the sheriff. Although he has returned that he has the sum in question ready to be paid over to the plaintiffs, it is quite clear that it never came into his hands or those of his officers, or any other person on his behalf. Besides, the plaintiff *White*, proved his debt under the commission which issued against the defendant, and was appointed one of his assignees. This, therefore, amounts to a recognition by him of the payment's being made to the solicitor on behalf of himself and his co-assignee. At all events, he knew the facts, and was aware that *Cohen* had paid over the sum in question to the solicitor, at least, long before the present application was made against the sheriff. Both the plaintiffs proved debts under the commission against the defendant, and signed an agreement to contribute their respective shares towards the

costs of the action against *Cohen*, in case the validity of the commission should not be established.

1820.

TOMLINSON  
v.  
SHYNN.

Mr. Serjt. *Laves*, in support of the rule, submitted that the only question was, whether the above circumstance amounted to a recognition by the plaintiff *White*, that the sum in question might be paid over to the solicitor under the defendant's commission, so as to exonerate the sheriff, although he had returned that he had it in his hands ready to be paid over to both the plaintiffs. It does not appear that they have proved under the commission, that this identical sum was due to them, or whether they have proved for joint or separate demands. Although the sheriff has not, in point of fact, received the money, still it was paid over by the connivance of his officer with *Cohen*. The sheriff cannot now be allowed to contradict his return, and more especially so, as the commission has turned out to be a nullity: at all events, if the plaintiff *White* assented to the payment to the solicitor under the commission, it could not bind *Tomlinson*, and they are therefore entitled to recover.

But, *Per Curiam*: the only question is, whether there has been a subsequent assent on the part of the plaintiffs sufficient to recognize and ratify the payment of the sum in question to the solicitor under the commission which issued against the defendant. The sheriff, in fact, has never received any part of it, and it must be a strong case to make him liable to pay it over to the plaintiffs. Besides, *Tomlinson* has made no affidavit that he was not aware of the payment over by *Cohen* to the solicitor, or that he did not assent thereto. It appears that both the plaintiffs proved debts under the commission. They therefore derived a benefit, as the bankrupt's funds were increased by such payment. Under these circumstances, the sheriff cannot be considered liable to pay over the money to the plaintiffs, and the present rule must therefore be

Discharged, with Costs.

1820.

Monday,  
June 12.

BROWN v. HOWARD.

Where the plaintiff, in a declaration of *assumpsit*, stated that he employed the defendant to invest and lay out the plaintiff's money in an annuity, on a good and sufficient security, which he promised to do, and assigned for breach that he laid it out on an invalid and fraudulent security:—Held, that the statute of limitations was a good bar to the plaintiff's recovery, as the promise of the defendant was the gist of the action, although the action was commenced within the period of six years from the time it was discovered that the security was invalid, and the defendant knew it to be so at the time the annuity was granted. *Sem. ble*, that in cases of fraud the statute of limitations only runs from the time the fraud is discovered.

THIS was an action of *assumpsit*. The first count of the declaration stated, that on the 19th of November, 1808, in consideration that the plaintiff would retain and employ the defendant to lay out and invest certain monies of the plaintiff, in the purchase of an annuity:—the defendant, for a certain reasonable reward to be therefore paid him by the plaintiff, undertook to lay out such monies, and invest them in a good, valid, and sufficient security. The plaintiff then averred, that he delivered to the defendant the sum of 406*l.* which he received, and invested in the purchase of an annuity of 58*l.* payable to the plaintiff, and assigned for breach, that the defendant did not lay out and invest such money on good, valid, and sufficient security, but on bad, invalid, insufficient, fraudulent and fictitious security, to wit, a pretended security of certain copyhold premises, whereof one *Alston* pretended to be seised, whereas, in fact, *Alston* was not seised thereof, nor entitled thereto;—of all which several premises the defendant had notice. There were two other counts nearly similar to the first, and a fourth, stating that the defendant undertook to invest the plaintiff's money on the security of a freehold estate, which was abandoned at the trial. The defendant pleaded, 1st, *non assumpsit*, and 2dly, that the cause of action did not accrue within six years.

At the trial of the cause, before Lord Chief Justice Dallas, at Westminster, at the Sittings after the [last] Hilary Term, it appeared, that the defendant was a certificated conveyancer; and that *Alston* had no title whatever to the copyhold premises in question. That the an-

*Quære*.—If a defendant undertakes to invest money on a copyhold security, it amounts to a warranty by him that such security shall be valid and sufficient?

1820.

BROWN  
v.  
HOWARD.

nuity was regularly paid from *November*, 1808, when it was granted, to *February*, 1814. That *Alston* then became insolvent, when it was first ascertained by the plaintiff that he had no right to the premises, and the present action was commenced within six years from that latter period, the writ having been issued in *January* last. For the defendant, it was objected, first, that there was no express agreement proved to have been made by him to provide a good security, or that he would warrant it to be so, and that such an undertaking could not be implied by law, and secondly, that the breach of the contract took place in 1808, when the annuity was granted and the securities executed, and consequently that the statute of limitations began to run from that time, and was a bar to the present action; and the case of *Battley v. Faulkener* (a) was referred to. As the declaration alleged that the defendant invested the money on a fraudulent security, of which he had notice, his Lordship left it to the Jury to determine whether at the time the annuity was negotiated, the defendant knew that *Alston* was not entitled to the premises. He observed, that it was the duty of the plaintiff to enquire into the facts, or examine the court rolls, if not, that he was guilty of negligence. The Jury found that the defendant had notice at the time the annuity was granted, that *Alston* had no right or title to the premises, and gave a verdict for the plaintiff, but the above objections were reserved for the opinion of the Court.

Mr. Serjt. *Vaughan* in the last Term, obtained a rule *nisi*, that this verdict might be set aside, and a nonsuit entered; and submitted, first, that no count in the declaration was supported by the evidence, that the defendant undertook to invest the plaintiff's money on a good and valid security. Such an undertaking must either be express, or resulting from the nature of the employment. When the sum in question was left with the defendant, he merely undertook to lay it

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(a) 3 Barn. & Ald. 288.

1820.

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BROWN  
v.  
HOWARD.

out on the specific security of copyhold premises, but he did not engage that it should be sufficient. The plaintiff continued to receive 14*l. per cent.* till 1814, and no fraud whatever can be imputed to the defendant. But the Learned Serjeant relied mainly on the second objection, viz. that the statute of limitations was a bar to the present action.

Mr. Serjt. *Lens* and Mr. Serjt. *Pell* now shewed cause; whether the declaration be properly framed or not, looking at the situation in which the parties stood, the law raises an obligation on the part of the defendant equivalent to a warranty, to invest the money entrusted to him by the plaintiff on good and valid security, although there was no express undertaking by him so to do. The plaintiff had no knowledge whatever of the validity of the security, but left it entirely to the discretion of the defendant, who received a remuneration for obtaining the annuity. Although in *Short v. M'Carthy* (a), where a breach to a declaration in *assumpsit* was stated to be, that the defendant omitted to make proper enquiries at the Bank of *England* on the sale of stock, and the omission took place more than six years before the action was brought, but the discovery of the injury sustained was not made until within that period, it was held that a plea of the statute of limitations was a good bar; still, that case is distinguishable from the present, as there, a distinct fact was to be ascertained at a precise and definite time. It was therefore a particular omission by the defendant not to make the search at that time. Here, however, the defendant knew at the time the annuity was granted, that *Alston* was not possessed of the copyhold premises, as he had represented to the plaintiff, who was wholly ignorant of that fact. As long as the annuity was paid, the plaintiff could have no cause of action, it could only be brought when default was made. In *Battleley v. Faulkener* the wheat was discovered to be

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(a) 3 *Barn. & Ald.* 626.

unproductive in a little more than a year after the sale took place, and the breach of the contract was known to the plaintiff more than six years before the commencement of the suit. This, however, is a case of fraud, and must be so considered, as it was treated as such by the plaintiff in his declaration; and the Jury found that the defendant knew *Alston's* circumstances, at the time the deeds were executed; that the security offered the plaintiff was not a *bona fide* security, and therefore that the transaction was fraudulent. There is no instance in which the statute of limitations has been held to afford a good defence in cases of fraud. But the contrary was expressly decided in the *South Sea Company v. Wymondsell* (a); and although Lord Chancellor King there held, that "it would be a good bar if the fraud were discovered more than six years before the bill filed," still, that observation does not affect this case, as here the action had been commenced within that period. If this had been a sale of timber, and it was known to the vendor to be unsound at the time of the sale, and the defects did not appear till more than six years afterwards, the purchaser would have no remedy, unless he could bring his action within six years after the discovery, although there was a breach by the seller at the time of the contract; but as he was then aware of the defective state of the timber, he could not set up the statute of limitations as a defence. So, here, the Jury found that the defendant knew the circumstances of *Alston* at the time the annuity was granted, but his insolvency was not discovered till nearly six years afterwards.

1820.  
BROWN  
v.  
HOWARD.

Mr. Serjt. *Vaughan*, in support of the rule, was stopped by the Court.

Lord Chief Justice DALLAS.—I am of opinion, that in this case a nonsuit must be entered. This however will not

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(a) 3 *Peere Wms.* 143.



1820.

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BROWN  
v.  
HOWARD.

deprive the plaintiff of any remedy he may have by bringing another action grounded on fraud, and which may be charged in the declaration, but, as to the propriety of such a step, I now decline giving my opinion, although I think it would be attended with some degree of difficulty. Here, the declaration is framed in *assumpsit*, and the promise must be co-extensive with the breach, and although fraud is there alleged, the promise, as stated, does not appear to me to amount to a warranty by the defendant to procure a good and valid security on investing the plaintiff's money. It is difficult to distinguish between cases of negligence or fraud, but if this declaration had been founded on the latter, the statute of limitations might possibly have been no bar; for in *Bree v. Holbech*(a), it was insisted, that where a party has been induced by fraud to pay money, the statute of limitations does not run, or at least, only runs from the time when the fraud is discovered, and several cases were cited in support of that position. Here, however, the declaration merely raises an implied promise by the defendant to lay out and invest the plaintiff's money in a good and valid security, it extends no further. That does not amount to an express warranty by the former to do so, at all events, and therefore the plaintiff cannot recover on this form of declaration. Besides, the case of *Short v. McCarthy*, appears to me to be expressly in point. That was an action of *assumpsit* against an attorney for negligence in omitting to make enquiries as to stock, stated to be standing in the names of certain persons in the Bank of England, and the omission having taken place more than six years before the commencement of the action, although not discovered till within that period;—the statute of limitations having been pleaded, it was held a good defence to the action. Here, too, the plaintiff was guilty of negligence in not having ascertained whether *Alston* had any interest in

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(a) 2 Doug. 656.

the copyhold, as was stated by the defendant at the time the annuity was granted.

1820.

BROWN

v.

HOWARD.

Mr. Justice PARK.—I am of the same opinion. Although this is a case of great hardship on the plaintiff, and I should have been induced to favour him at *Nisi Prius*, still, I do not see how the Court can go out of the statute, or the cases that have been decided upon it. By the former it is expressly enacted (a), that “all actions of account, and upon the case, shall be commenced and sued within six years next after the cause of such action or suit, and not after.” Here, the gist of the action is, that the defendant took an improper security. In *Battley v. Faulkener*, Mr. Justice Best observed, that (b) “the only question was, when the cause of action accrued, for that the statute then attached, and he thought that the cause of action accrued the moment the defendant failed to perform that which he agreed to do.” That observation appears to me to be well put, and not easily got over. But the subsequent case of *Short v. M’Carthy*, is undistinguishable from the present, except as to the nature of the property, the one, consisting of stock in the Bank of *England*, and the other of copyhold premises, which were stated to belong to a certain and named individual.

Mr. Justice BURROUGH.—It appears to me to be unnecessary to decide this case on any other ground than that the declaration, as framed, does not meet the plaintiff’s case. He might have searched the Court Rolls of the Manor at any time after the securities were executed, and might then have maintained an action against the defendant on shewing that his annuity was not well secured, but that on the contrary the defendant had taken a fictitious and invalid security.

Mr. Justice RICHARDSON.—I also abstain from giving

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(a) 21 Jac. 1. c. 16. s. 3. ————— (b) 5 Barn. & Ald. 295.

1820.  
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 BROWN
 v.
 HOWARD.

any opinion as to whether the promise, as stated in the declaration, amounts to a warranty by the defendant, but think that the statute of limitations operates as a bar to the plaintiff's recovery in this action. The declaration is founded on a promise, and the breach of the contract is the gist of the complaint. It appears to me, that the contract was broken when the money was invested, and the securities completed; and the late cases of *Battley v. Faulkener*, and *Short v. M'Carthy*, are conclusive on the question as to the effect and meaning of the statute.

Rule absolute for a Nonsuit.

Tuesday,
 June 13.

EDGE, Demandant; TAYLOR, Tenant; WARREN and
 Wife, Vouchees.

The writ of entry in a recovery may be amended, by altering the name of the demandant, and transposing that of the tenant, on an affidavit that all the parties interested were living, and assenting to the amendment.

MR. Serjt. *Vaughan* moved, that the writ of entry in this recovery, which was suffered in *Michaelmas* Term, 56 Geo. 3. might be amended, by making one *Harris* the Demandant, and *Edge* the Tenant, on an affidavit which stated, that the wrong names of the parties had been inserted by mistake; that they were all alive, and willing to accede to the amendment as prayed for. He cited *Pigott on Recoveries* (a), to shew that amendments of this description had been frequently allowed, and observed, that the writ might be re-sealed as a matter of course, at the office of the Cursitor, in case the Court should grant the amendment, which merely amounted to a correction of a mistake, and the alteration and transposition of the names of the parties.

The Court were at first inclined to think, that the writ could not be amended; and they reprobated in strong terms, the extreme carelessness with which these important documents were executed; but eventually

1820.
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EDGE,
Demandant.

Allowed the Amendment (a).

(a) By the statute 8 Hen. 6. c. 12, this Court is authorized to amend the misprision of the clerk, in a fine or recovery, and a mistake in a writ of entry may be amended, when it was occasioned by such misprision, and there is something to amend by. See 2 Tidd, 7th edit. 733; and in *Cross*, Demandant, *Grey*, Tenant, *Pead*, Vouchee, 1 Bos. & Pul. 137, a mistake in the writ of entry was amended by the deed to lead the uses. So, in *Wheeler*, Demandant, *Hill*, Tenant, *Heseltine*, Vouchee, 2 Bos. & Pul. 560, a recovery was amended, by inserting a new parish in the same county, in the writ of entry, on an affidavit of intention to pass all lands in that county, and that all the parties interested were assenting. So, a return to a writ of entry was amended by adapting it to the time of taking the acknowledgment. *Hind*, Demandant, *Milne*, Tenant, 5 Taunt. 259. But a writ of entry in a fine was refused to be amended, by inserting the word "tithes," where the word "hereditaments," in the deed, and which was supposed to include them, was confined to hereditaments appurtenant to land. *Phillips v. Jones*, 3 Bos. & Pul. 362.

SAMPSON and Others, Assignees of COOK, a Bankrupt,
v. BURTON and Others.

Tuesday,
June 13.

THIS was an action of *assumpsit*, on a guarantie. The first count of the declaration stated, that *Cook*, the bankrupt, before the making the promise of the defendants, had in his possession, as a warehouseman, at a certain magazine of his, goods in his warehouse on their behalf, and delivering the same up to them when requested so to do. On production of the instrument, it appeared that the defendants only guaranteed him for holding the goods in his warehouse on their behalf:—Held, that this was no variance, as it must be implied, that he was to deliver them up to the defendants.

Goods taken under an execution against *A.* which had been in his possession more than two months before issuing a commission against him, may be considered as his property, under 49 Geo. 3. c. 121. s. 2, and may be described as such in a declaration of *assumpsit* by his assignees, on a guarantie given by the defendants to the bankrupt.

Held also, that a guarantie is merely a contract to indemnify upon a contingency, and being in the nature of a claim for unliquidated damages, it cannot form the subject of a mutual credit, under 5 Geo. 2. c. 30. s. 28.

1820.

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SAMPSON
v.
BURTON.

eighty half-barrels of gunpowder, before then shipped by the defendants to *Plymouth*, for one *David Andrews*; and that, in consideration that *Cook* would hold the powder in the magazine, on behalf of the defendants, and *would give up the same to them* when requested so to do, they guaranteed to indemnify *Cook*, and save him harmless from any responsibility in so holding the powder in the said magazine on their behalf, and so giving it up to them when requested, and to pay him the freight of *3l.* then payable in respect of the powder, and the expences of keeping the same in his said magazine. The plaintiffs then averred, that *Cook* did hold the gunpowder in his magazine, on behalf of the defendants, and afterwards gave up and delivered the same to them, and assigned for breach, that they did not guaranty or indemnify *Cook* from responsibility in so holding the powder on behalf of the defendants, and giving up the same to them when requested so to do; that in consequence thereof, *Andrews* brought an action of trover against *Cook*, in the Court of *Exchequer*, for the recovery of damages in respect of *Cook's* having so held and given up the powder to the defendants, and recovered *23l. 14s. 6d.* damages and costs, against *Cook*, and that such proceedings were afterwards had upon the judgment, that divers goods and chattels of *Cook*, of the value of *500l.* were seized and taken in execution, under a writ of *fieri facias* issued on the judgment against the goods of *Cook*, which were afterwards sold by the sheriff for a small sum of money, so that the defendants have not indemnified *Cook* against the said responsibility and loss, or any part thereof, but have wholly neglected so to do. The second count stated, that in consideration that *Cook* would give up the powder to the defendants, they promised to indemnify and save him harmless from any damage on account of his so giving up the same, and assigned for breach that they did not do so. The third count was similar to the second, except in stating, that *Cook* had given up the powder to the defendants, and that the goods

taken by *Andrews*, under the writ of *feri facias*, were taken "as and for the goods of *Cook*." To these were added counts for warehouse-room, and the usual money counts.—Plea, General Issue.

1820.
SAMPSON
&
BURTON.

At the trial of the cause, before Mr. Baron *Wood*, at the last Assizes at *Exeter*, it appeared, that, in the months of *March* and *April*, 1817, the defendants, according to two orders received from one *Andrews* at *Plymouth*, shipped for him, eighty half barrels of gunpowder, which were received into the magazine of *Cook*, a merchant and warehouseman there, by the direction of *Andrews*; that the defendants, in *May*, 1817, having ascertained that *Andrews* was insolvent, in order to stop the powder *in transitu*, wrote to *Cook*, to whom they had previously been in the habit of selling powder, requesting him to detain, on their account, the powder which had been sent by them to *Andrews*, and they also forwarded the following guarantie addressed to *Cook*:—

"*London*, 22nd *May*, 1817.

"We do hereby guaranty you for any responsibility in holding in your magazine, on our behalf, eighty half barrels of gunpowder, shipped by us to *Plymouth*. The freight of *Sl.*, and expences of magazine, we agree to pay you in consequence."

Signed by the defendants.

Cook, being at this period indebted to the defendants, on his private account, agreed to hold the powder for them, and, in the month of *June* following, he caused it to be delivered up to them in consequence of the above guarantie. Soon after this period, *Andrews* was declared bankrupt; but his commission being superseded in *January*, 1818, he demanded the powder of *Cook*, and commenced an action of trover against him in *Hilary* Term in that year, and as he did not defend it, final judgment was signed against him in the *Michaelmas* Term following.

1820.
 ~~~~~  
 SAMPSON  
 v.  
 BURTON.

for 231*l.* 14*s.* 6*d.*, and execution was levied on his goods to that amount, on the 21st of *November* in that year. A commission of bankrupt was issued against *Cook*, on the 18th of *February*, 1819, on an act of bankruptcy committed by him in the month of *April* 1818. It also appeared, that *Cook* was indebted to the defendants in the sum of 256*l.* 2*s.* 7*d.*, being the amount of two of his acceptances, which had been dishonoured by him and provided for by them, and which latter sum was due to them on the balance of accounts at the time of the bankruptcy. For the defendants it was objected, first, that the declaration could not be supported by the guarantie offered in evidence, inasmuch as the latter was a guarantie to *Cook* for any responsibility in holding the powder in his magazine; whereas it was stated in the declaration, not only that he should hold the powder, *but give up the same* to the defendants, when requested so to do. Secondly, that the declaration stated the goods taken under *Andrews'* execution to have been the property of *Cook*, the bankrupt, whereas at that time they were the property of his assignees. And lastly, as the defendants claimed to be allowed against their guarantie, if enforced, their demand against *Cook*, on the two outstanding bills accepted and dishonoured by him, with interest due thereon up to the date of the commission, on the ground of mutual credit, they were, consequently, entitled to set it off, under the 5 *Geo. 2. c. 30. s. 28.(a)*. The learned Baron intimated an opinion, that as to the first point, the guarantie was in substance set out in the declaration, as it in terms implied a promise by *Cook* to give up the powder to the defendants, as it would be nugatory to suppose that he was only to hold it. He also thought that the other objections were not tenable, but reserved them all for the consideration of the Court. The Jury having accordingly found a verdict for the plaintiffs for 263*l.*,

Mr. Serjt. *Vaughan*, in the last Term, obtained a rule

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(a) See that section, ante, vol. i. page 432.

*nisi*, that it might be set aside, and a nonsuit entered; and submitted, first, that there was a variance between the guarantie as proved, and that set out in the declaration. Secondly, That the commission issued against *Cook*, in *February*, 1819, had relation to the act of bankruptcy committed by him in the month of *April* preceding, and therefore that the goods vested in the assignees from that time, and should have been so described in the declaration; or that, at all events, they were their property when they were taken under the execution sued out by *Andrews*. Lastly, That as it appeared at the trial, that there had been dealings between the defendants and *Cook* previously to the guarantie, and that he was their debtor when it was given; they were entitled to set off the sum so due to them on his dishonoured acceptances, as constituting a mutual credit, within the cases of *Olive v. Smith* (a), *Cumming v. Forrester* (b), and *French v. Fenn* (c). Besides, the gunpowder in question was of a certain value, and the damages the plaintiffs had sustained were specifically set out in the declaration.

1820.  
SAMPSON  
v.  
BURTON.

Mr. Serjt. *Pell*, and Mr. Serjt. *Bosanquet*, now shewed cause; and as to the first objection, observed, that there were two letters, subsequent to the date of the guarantie, produced at the trial, which clearly shewed that the intention of the parties was for *Cook* to hold and deliver up the powder to the defendants (d). Besides, the learned Judge

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(a) 5 Tunt. 56. — (b) 1 Maule & Selw. 494. — (c) 1 Cooke's Bank-Laws, 7th edit. 536.

(d) The first of these letters was dated on the 29th of June, 1817, signed by one of the defendants, and addressed to *Cook*, in which he stated that, "respecting *Andrews*, we (the defendants) shall argue the matter with the Commissioners. You (*Cook*) are not answerable, as we guaranty you, and you have only acted legally in giving up the gunpowder, having received our attorney's notice, and as *Andrews* had never had possession of the gunpowder, nor had broken bulk." — The second was dated on the 11th of July, 1817, signed by the defendants, and addressed to *Cook*, stating, "that *Andrews* had just agreed with his creditors to pay 10s. in the pound,



1820.  
 ~~~~~  
 SAMPSON
 v.
 BURTON.

there observed, that it was nugatory to suppose that he was merely to hold it for them. Secondly, The goods were properly described in the declaration to be in the possession of *Cook*, and not his assignees. He had a right to retain the powder, as against all persons but them; *Webb v. Fox(a)*, *Fowler v. Down(b)*; and, at all events, had a special property in it, with reference to any acts that *Andrews* might pursue. Besides, in the third count of the declaration, the powder was stated to have been given up to the defendants, "*as and for the goods of Cook.*" But further, by the 49 *Geo. 3. c. 121. s. 2*, all executions against the goods of a bankrupt are protected, if *bonâ fide* levied more than two months before the date and issuing of the commission; and it appears that no commission had been issued against *Cook*, until nearly three months had elapsed from the time that *Andrews* sued out his execution. Thirdly, The claim of the defendants against *Cook*, for the sum due by him on the dishonoured bills before his bankruptcy, cannot be considered as a mutual credit, so as to entitle them to set it off, under the 5 *Geo. 2. c. 30*. When the guarantie was given by them to *Cook*, it merely gave him a possibility of a claim in the nature of unliquidated damages, in case the guarantie should be broken. The defendants had their remedy by action against *Cook*, for the sum due to them before that instrument was given. If either he or the present plaintiffs had been made defendants, the guarantie could not have been available in the nature of a set-off. The case of *Glennie v. Edmunds(c)*, has a strong resemblance to the present, as to

so that they would now apply to you (*Cook*), and *Andrews* will act as they choose; but you are guaranteed legal steps by us, and we should employ our own attornies for you. We shall credit you with rent and boat-hire; the freight has also been agreed for. If you have a receipt, we shall credit you;—and send your account, charging the magazine rent."

(a) 7 *Term Rep.* 391.—(b) 1 *Bos. & Pul.* 44.—(c) 4 *Tunst.* 775.

whether the guarantie in question can form the subject of a mutual credit. There, the bankrupts were indebted to the defendant, an underwriter, for premiums of insurance, the amount of which was proved under the commission, and a loss accrued :—It was held, that the latter was not entitled to set off the amount of such loss against the amount of premiums ; that it was not a mutual credit ; and that the loss was only a possible debt. *Olive v. Smith* was decided on a different principle, as there a mutual trust was created. Here, however, a mere guarantie was given, which, if broken, might by possibility subject the defendants to liability, in an action by *Cook* to recover damages for the breach of it. That, therefore, amounts neither to a case of mutual trust nor mutual credit. In *Crawford v. Stirling* (a), it was determined by Lord *Ellenborough*, that where *A.* guarantees the payment of goods furnished by *B.* to *C.*, and *B.*, upon the insolvency of *C.* admitted the amount of the goods, and of his consequent liability—such amount could not be set off in an action by *A.* against *B.* So, here, the gunpowder was the property of *Andrews*, and not of *Cook* ; and that last case is decisive to shew, that a guarantie being in the nature of unliquidated damages, cannot be considered as a mutual credit, and capable of being set off under the 5 Geo. 2. c. 30. s. 28.

Mr. Serjt. *Vaughan* and Mr. Serjt. *Hullock*, in support of the rule, contended, first, that no count of the declaration, whether taken collectively or severally, was sustainable by the guarantie as given in evidence—as it merely authorised *Cook* to hold the powder on account of the defendants—it was not intended to encrease his liability, by giving it up to them, and it cannot be implied, from the terms of the instrument, that he was bound to do so. The other

(a) 4 Esp. 207.

1820

 SAMSON
 &
 BENTLEY

1820.
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 SAMPSON  
 v.  
 BURTON.

letters given in evidence, were written after the powder was given up, and therefore could not be called in aid, for the purpose of explaining the guarantie. Besides, the powder was in fact the property of *Andrews*, and vested in him at the time the guarantie was given. If he had indemnified *Cook*, the latter would have held it for the benefit of the owner; but the defendants are in the situation of third persons, and if they had indemnified *Cook* in delivering up the property to them, it would not only have varied his liability, but extended his engagement. Besides, the powder was *in transitu*, and *Cook* was merely desired to hold it in his magazine, on account of the defendants; that, therefore, is distinct from indemnifying him on his giving it up to them. If he had with-held it, and the defendants had brought an action against him for not giving it up to them, such action could not be maintained on the faith of the guarantie in question. A contract must either be stated in the exact language in which it is framed, or according to its substance and legal effect. *Bristow v. Wright (a)*. Here, the guarantie is stated as an entire contract in the declaration, and the subsequent letters cannot be resorted to, to shew that the defendants intended to indemnify *Cook* in holding the powder, and giving it up to them.—[Lord Chief Justice *Dallas*. The powder was originally the property of the defendants. They consigned it to *Andrews*, who sent it to *Cook's* magazine, and the defendants guaranteed his holding it on their behalf. If a person sends a carriage to a livery stable, and desires the keeper to hold it on his behalf, must it not be intended, that he is bound to deliver it up to the person sending it, when required so to do? It strikes me, that the words, "delivering up," may therefore be considered as impertinent and immaterial.]—Secondly, at all events, the powder was the property of the assignees, and not of the bankrupt, and should have been

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(a) 2 Doug. 667.

so stated in the declaration. The 49 Geo. 3. c. 121. is no answer to that objection. That statute merely allowed executions sued out two months previous to the commission to be valid, but it did not alter the bankrupt's property in the goods. The powder in question, at the time it was taken in execution, was the property of the assignees, and not the bankrupt. He could not have maintained trover for it, but his assignees might, and it would have been no defence, that it was taken as being the property of the bankrupt. The case of *Webb v. Fox* is inapplicable to the present, as there, the property was acquired subsequently to the bankruptcy; the bankrupt therefore had a right to it against all the world, but his assignees. So, in *Fowler v. Down*, the debt accrued subsequently to the bankruptcy, and before certificate. So, in *Clark v. Calvert (a)*, it was laid down as a general rule, that a bankrupt has a right against all persons but his assignees, although the whole of his property, and all the powers to turn that property to profits, vested in them. Here, therefore, it is quite clear, that the assignees might have brought an action in their own names, and the goods might have been stated to be their property, as assignees, and not as belonging to *Cook*, at the time of the seizure under the execution by *Andrews*. Thirdly, The only remaining question is, whether this is a mutual trust or credit, and within 5 Geo. 2. c. 30. s. 28, and not whether the guarantee forms of itself a subject of set-off. It is quite clear, that unliquidated damages fall within the statute as a mutual credit; for Lord *Ellenborough*, in *Cumming v. Forrester (b)*, said, that "the statutes of set-off apply only to mutual debts, and are therefore not like the statute of bankrupts, which embraces mutual credit, and that it was sufficient to say, that mutual credit, *et vi termini*, imports unliquidated damages; and when they can be so arranged,

1820.

SAMPSON  
v.  
BURTON.

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(a) *Ante*, vol. iiii. page 9C. — (b) 1 *Moul. & Selw.* 499.

1820.  
 ~~~~~  
 SAMPSON
 v.
 BURTON.

the account may be taken between the parties." Here, the extent of the demand was ascertained by the judgment obtained by *Andrews* against *Cook*. In *Ex parte Flint* (a), Lord *Eldon* observed, that "it had been long settled that the statute 5 Geo. 2. c. 30. s. 28. authorises the bringing into mutual account, a great variety of items which could not be made the subject of set off, a doctrine which seems founded on notions of natural equity, and has been carried as far as construction can well carry it." In *Ex parte Deeze* (b) it was determined, that mutual debts were not to be confined to pecuniary demands, and that principle was recognised in *Olive v. Smith*, for in the former case, Lord *Hardwicke* said (c), that "it was very hard to say mutual credit should be confined to pecuniary demands, and that if a man had goods in his hands belonging to a debtor of his, which could not be got from him without an action at law, or bill in equity, that it should not be considered as mutual credit." The same distinction was taken in *Key v. Flint* (d), although, there, the parties had been guilty of a gross breach of trust, on which ground it was decided, that it could not be considered as a case of mutual credit. *Glennie v. Edmunds* does not affect the present question, as there the loss was attempted to be set off after the bankruptcy;—and the rights of third persons intervened; neither does *Crawford v. Stirling* militate against it, as here it is quite clear that the damages could not form the subject of set off. Besides, the value of the property is now only sought to be recovered, and although it may be uncertain what sum the defendants may be called on to pay under their guarantie, still it can be no more considered in the nature of unliquidated damages than in the case of *Olive v. Smith*, where it was impossible to ascertain the amount for which the goods might be sold.

Lord Chief Justice DALLAS.—I am of opinion that the

(a) 1 Swanst. 34.—(b) 1 Atk. 229.—(c) *Id. Ibid.*—(d) *Ante*, vol. i. page 451.

rule which has been obtained in this case must be discharged. What are the facts? The gunpowder in question originally belonged to the defendants, who consigned it to *Andrews*, and forwarded it to *Plymouth* to be delivered to him there. He directed it to remain in a magazine of *Cook*, the bankrupt, and whilst in his custody, the defendants, having received notice of the insolvency of *Andrews*, conceived they had a right to stop it in *transitu*, and consequently indemnified *Cook* in holding it for them, and requested him not to deliver it up to *Andrews*. With respect to the first objection, that it is alleged in the declaration that the defendants guaranteed to indemnify *Cook* from any responsibility in holding the powder in his magazine, and giving it up to them, and that the latter stipulation is not introduced into the guarantie itself, still, it is there stated, that he was to hold it on their behalf. It was consequently subject to their order and disposition, and if the bankrupt had refused to deliver it to them in pursuance of such order, he would have been liable to an action. Whether therefore it were a holding or a giving up the powder, it was to remain with *Cook*, subject to their order, and if he held it on their account, a delivery up to them must necessarily be implied, I therefore think that there was no variance between the contract as stated in the declaration, and that proved on the production of the instrument itself. Secondly, as to whether the goods taken under the execution by *Andrews*, ought to have been described in the declaration as belonging to the assignees?—I am clearly of opinion, that they were for this purpose to be considered as the goods of the bankrupt *Cook*, the execution having been levied and executed more than two months before the suing out of the commission. This therefore falls expressly within the second section of 49 *Geo. 3. c. 121*, and the execution was valid and effectual as against the goods of the bankrupt. Lastly, as to the subject of mutual credit, it is unnecessary to comment at any length on the decisions as being applicable to it. The doctrine laid down in

1829.


 SAMPTON
 v.
 BURTON.

1630.

 SAMPSON
 v.
 BURTON.

Olive v. Smith, has been since narrowed, and, according to the later cases, it is only necessary to consider whether, under the present circumstances, this can be considered as a mutual credit. It has not been contended that the guarantie in question could form the subject of a set off. No plea or notice of set off was given; besides, the defendant's claim, is in the nature of unliquidated damages; it is therefore reduced to the single question, whether it can be considered as a mutual credit subsisting between the defendants and *Cook* before and at the time of his bankruptcy? The case of *Olive v. Smith* is very distinguishable in circumstances from the present, as there, the bankrupt entrusted his creditor with a power to sell; and when he had disposed of the property, the sum received for it would form an item in his account, and it might consequently be considered as a mutual trust; but here, the trust is altogether of a different description. The bankrupt was indebted to the defendants as the acceptor of two bills of exchange, which the latter had taken up on his account. They afterwards gave him the guarantie in question, which rested on a mere contingency, namely, to indemnify the bankrupt against any responsibility which might attach to him by holding the gunpowder in his hands on their account. No case has ever gone the length of shewing that this can be considered a mutual credit. *Glennie v. Edmunds* has been referred to in the course of the argument, where it was decided, that when the contingency which is to determine the nature or amount of the debt to the bankrupt, does not happen until after the bankruptcy, the debtor cannot set off against it a previous debt due from the bankrupt. So, here, the loss that might be incurred by the defendants in consequence of the guarantie given by them, rested on a contingency which did not take place until after the bankruptcy of *Cook*, and which alone could determine the amount of the debt due. This, therefore, cannot be considered as a mutual credit existing between *Cook* and the defendants at the time of his bankruptcy. And although the case of *Glennie v. Edmunds* must govern the present, still

this could not be deemed a mutual credit, either on principle, or as falling within any of the previous decisions.

1630.

 SANFORD
 v.
 BENTON.

Mr. Justice PARK.—I am of the same opinion as to all the objections that were taken at the trial. As to the first, there can be no doubt, but that the legal result of the guarantie was properly set out in the declaration, as an indemnity for the bankrupt's holding and delivering up the powder to the defendants, for by the terms of the instrument itself, it appeared that he held it *on their behalf*. It cannot be presumed that he was to continue to do so, but that he was to retain it, subject to the defendant's order for delivering it up to them; and I think my Brother *Wood* was perfectly right in the construction he put upon it at the trial. As to whether the goods were properly described as belonging to the bankrupt, it appears that the execution by *Andrews* was levied and executed in *November*, 1818, nearly three months before the issuing the commission. If the person levying, had been at the time cognizant of the act of bankruptcy previously committed by *Cook*, the statute of the 49th *Geo.* 3. would not apply, as it enacts, that "in all commissions thereafter to be issued, all executions against the lands or goods of a bankrupt, *bona fide* executed and levied more than two months before the date of the commission shall be valid, &c. provided the person at whose suit such execution shall have issued, had not at the time of executing the same, any notice of any prior act of bankruptcy committed by such bankrupt, or that he was insolvent, or had stopped payment." The express object of that statute was to protect executions of this particular nature. With respect to the question as to whether the guarantie can be considered as forming the subject of a mutual credit under the 5 *Geo.* 2. c. 30. s. 28. it is now unnecessary to say that such credit ought, in point of strictness, to be confined solely to pecuniary transactions, but since the case of *Ex parte Deeze* (a),

(a) 1 *Atk.* 229.

1820.

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 SANFSON
 v.
 BURTON.

it is too late so to confine it. The doctrine, however, as to this point, has been extended to its fullest length in *Oliver v. Smith*; and whether that case has not carried the principle too far, it is unnecessary now to determine. In *Rose v. Hart* (a) this question was fully considered by the Court, who after having taken some time for deliberation, determined in the result, that in order to constitute a mutual credit within the statute, it must be confined to pecuniary demands on such credits only, as in their nature will terminate in a debt, or in other words, to confine it to cases where goods are deposited, for the purpose of being converted into money, and not to extend it to a mere deposit, where a sale is not contemplated by the parties.

Mr. Justice BURROUGH.—I fully agree with my Lord Chief Justice and my Brother *Park*, in the opinions they have delivered on all the points submitted for the consideration of the Court. First, it is quite clear from the terms of the guarantie itself, that a delivery up of the powder to the defendants must be implied, and although I think that the first count is substantially good, still there can be no question, but that if it be coupled with the second and third, the declaration may be well sustained. Secondly, as to the allegation that the goods were the property of *Cook* at the time they were taken in execution, the statute 49 Geo. 3. c. 121. is a complete answer to that objection, but it was sufficient even without the assistance of that statute, for in point of fact, they were his goods at the time of the levy. But it is averred in the third count, that they were taken “as and for his goods,” that is correct, at all events, as they were seized as his property at the time. Thirdly, as to whether this be a mutual credit, which is the most material point to be considered, it appears to me that it cannot be so deemed, and that the cases of *French v. Fenn* and *Rose v. Hart*, are decisive

(a) Ante, vol. ii. 547.

of the question, and that the principles laid down in them are perfectly correct. In the former (a) an action was brought against the defendant for money had and received to the use of the plaintiffs as assignees of *Cox*, a bankrupt, who it appeared was indebted to the defendant at the time of his bankruptcy, and, had entrusted him with his third share or interest in a string of pearls to be sold by the defendant, and the profit on such share was to be paid to *Cox*, the bankrupt. The defendant sold the pearls after the bankruptcy of *Cox*, and his assignees brought an action against the defendant for the bankrupt's share of the profits, and the question was, whether the defendant was entitled to set off the sums owing to him from the bankrupt in bar of the action brought by his assignees for the third of the profits arising from the sale of the pearls; and it was insisted for the defendant, that there was a mutual credit, although not a mutual debt at the time of the bankruptcy, and that the one could not be demanded without satisfying the other; and Lord *Mansfield* there said (b), that "the act of parliament was accurately drawn to avoid the injustice that would be done if the words were only mutual debts, and it therefore provided for mutual credit; that, in that case, credit was given to the defendant for a row of pearls, which was to belong in thirds to three persons, as the defendant advanced the whole money, the other two were to pay him interest for their shares till the pearls were sold; that there was no doubt but that there was a mutual credit, that the bankrupt had trusted the defendant with the pearls, and that he had trusted the bankrupt with other goods, which in all probability he would not have otherwise done, that that was the real justice of the case if there had been no bankruptcy, and that the bankruptcy ought not to alter the real justice of the case." It is quite clear, therefore, that mutual credits may be constituted on pecuniary demands, which will, from their nature, necessarily

1820.
SAMPSON
&
BURTON.

(a) *Cooke's Bankrupt Laws*, 7th edit. 536.—(b) *Id.* 538.

1829.

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 SANFORD
 v.
 BUCKTON.

terminate in a debt. In *Rose v. Hart* (a) an action of trover was brought by the assignees of a bankrupt, for cloths left by him before his bankruptcy with a fuller, to be dressed; there was then a balance due from the bankrupt to the defendant for work previously done by him on other cloths which had been delivered to him at various times. The assignees tendered to the defendant the sum due for the work done on the cloths then in his possession, and demanded them from him, but the defendant refused to deliver them up, unless he was paid his general balance, on the ground of mutual credit under the 5 Geo. 2. c. 30. s. 28. and the Court were unanimously of opinion, that as the defendant had received these cloths for the purpose of dressing them only, he had no right to detain them for his general balance under that clause. And Lord Chief Justice *Gibbs*, in commenting on that section, said (b), "Something more is certainly meant by mutual credit than the words mutual debt import, and yet upon the final settlement, it is enacted merely that one debt shall be set off against the other. We think that the legislature meant such credits only as must in their nature terminate in debts, as where a debt is due from one party, and credit is given by him to the other for a sum of money payable at a future day, and which will then become a debt; or, where there is a debt on one side, and a delivery of property, with directions to turn it into money on the other." These two cases, if taken together, clearly shew what was meant by the statute to constitute a mutual credit, viz. that it must be confined to those demands which shall become of a pecuniary nature, and eventually terminate in a debt. Here, however, there was a mere guarantie, which altogether rested in damages, and under which nothing could be ascertained until after verdict. How, therefore can it be considered as a mutual credit, or be said to resemble a pecuniary demand? Previously to the verdict

(a) Ante, vol. ii. 547. — (b) *Id.* 550.

it was only a contingent claim for unliquidated damages, and I therefore think there was no ground for any of the objections that have been raised, and, consequently, that this rule must be discharged.

1699.

 Sampson
 v.
 Burton.

Mr. Justice RICHARDSON.—I am of the same opinion. As to the first point, the defendants engaged to guaranty *Cook* against any responsibility which might attach to him in holding the gunpowder in his magazine on their behalf. It must therefore be necessarily implied, that he was to deliver it up to them when required so to do. It has been admitted, that if it belonged to the defendants as owners, he would be bound to do so, but it has been said, that it was in fact the property of *Andrews*. The defendants however, claimed it as being theirs, and *Cook*, the bankrupt, treated it as such. It therefore appears to me, that the allegation in the first count may be sustained, but at all events, the third, which is founded on an executed consideration, is sufficient; secondly, the statute 49 Geo. 3. c. 121, makes the goods taken under the execution by *Andrews*, the property of *Cook*, and his assignees cannot rescind or invalidate such execution. As to the last objection, if it rested entirely on the statute 5 Geo. 2. c. 30. s. 28. there can be no doubt, but that it extends to mutual credit as well as mutual debts; but it is directed by the latter part of that section, that “what shall appear to be due on either side on the balance of such account, and on setting such debts against one another, and no more, shall be claimed or paid on either side respectively.” It therefore appears to me, that credit and debts must be considered as forming the subject of an account or debt which may be set off against some other account. It is true that this statute has been construed to extend to a mere deposit of goods, but the right line of distinction was drawn in *Rose v. Hart*, in which it was deemed to be confined to cases where the credit given by the delivery of goods, must in its nature terminate in a debt, and that which has been

1820:

 SAMPSON
 v.
 BURTON.

allowed as a mutual credit, must terminate in a cross debt. This case however goes much further, as it is merely in the nature of a mutual contract to indemnify on a contingency, and it has never been decided, that that will amount to a mutual credit. The case of *Glennie v. Edmunds* bears the nearest resemblance to the present, although there the credit was far more definite, as the loss was to be settled under the policy. Here, however, the guarantie was merely in the nature of an indefinite contract of indemnity, and the damages that might result from it, were unliquidated and uncertain, and could by no possibility be ascertained until after verdict.

Rule discharged.

Wednesday,
 June 14.

KNIGHTS, Administrator, v. QUARLES, Gent. one, &c.

Where the plaintiff as administrator, declared in *assumpsit* that the intestate had retained the defendant as his attorney, to investigate and procure a good title of an estate about to be conveyed to the intestate as purchaser, and assigned

for breach that he did not do so, but accepted a bad and defective title in the life-time of the latter, whereby his personal estate was much injured:—Held, on demurrer to the declaration, that the action was well brought, although it was objected, first, though it was framed in contract, it was in substance a *tort*, arising from a neglect of duty by the defendant; secondly, that the heir should have sued, and not the administrator, as it was a contract which ran with the land; and lastly, that it was not alleged in the declaration, that the defendant undertook to ascertain and procure a good title in his professional character as an attorney;—for by the demurrer, the defendant admitted the promise to the intestate, as well as the allegation that the injury accrued to his personal estate during his life time, and it must be implied that he was bound to fulfil his duty as an attorney, it being alleged that the intestate employed him as such.

THIS was an action of *assumpsit*. The first count of the declaration stated, that before the time of making the promise thereafter mentioned, and in the life-time of the intestate, the latter had contracted and agreed with one *Savory* for the purchase from him by the intestate of certain premises, situate at *Thetford*, in the county of *Norfolk*, for the sum of 2000*l.* to be therefore paid for the same, which premises *Savory* then assumed to have sufficient power and title to sell and convey to the intestate;—that thereupon, in the life-

time of the intestate, to wit, on, &c. at, &c. in consideration of the premises, and that the intestate, at the special instance and request of the defendant had then and there retained and employed the defendant as his attorney and solicitor, to ascertain and investigate the title of *Savory* to the said premises, and to cause and procure the same, and a good title thereto, to be duly and effectually conveyed by *Savory* to the intestate as the purchaser thereof, for certain reasonable fees, to be therefore paid by the intestate to the defendant in that behalf; the defendant undertook, and promised the intestate in his life-time, to perform and fulfil his duty in the premises. The plaintiff then averred, that although it became and was the duty of the defendant, under and by virtue of the said retainer, to investigate carefully the title of *Savory* to the premises, and to take due and proper care that a bad, defective, and insufficient title to the same should not be accepted and received by the intestate in that behalf;—Yet that the defendant not regarding his duty in that behalf, but contriving, &c. to deceive and defraud the intestate in his life-time, did not, nor would, carefully investigate the title of *Savory* to the premises, nor take due or proper care that a bad or insufficient title was not accepted and received by the intestate, but on the contrary thereof, the defendant wholly neglected and refused so to do, and afterwards and in the life-time of the intestate, to wit, on, &c. at, &c. the defendant, in violation of his said promise and undertaking, caused and procured, and suffered and permitted the intestate without his knowledge or consent, to accept and receive; and the intestate in his life-time, did then and there accordingly accept and receive from *Savory*, a bad, defective and insufficient title to the premises, and thereupon such title was then and there conveyed by *Savory* to the intestate in his life-time, and the intestate paid *Savory* as the consideration money in that behalf, 2000*l.*—By means of which said several premises, the intestate in his life-time, and until and at the time of his death, held the premises on a bad and insufficient

1826.
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 KNIGHTS  
 v.  
 QUARLES.

1820.  
  
 KNIGHTS  
 v.  
 QUARLES.

title, and was in his life-time wholly unable to sell or dispose of the same; and also thereby, one *Stringer*, to whom the intestate had agreed to sell and convey a good title to the premises for 1853*l.* wholly declined to accept the said title of the intestate to the premises, or to purchase the same from him, whereby the intestate in his life-time, lost divers gains and profits, which would otherwise have accrued to him from the completion of the agreement with *Stringer*; and the intestate also sustained divers expences, amounting to 200*l.* about the endeavouring to obtain and convey to *Stringer* a good title to the premises, which became uncultivated and lessened in value, whilst the intestate was endeavouring to sell the same; and that he in his life-time, was, by means of the premises otherwise greatly injured, and his personal estate diminished and lessened in value.

The second count was similar to the first, omitting the intestate's contract with *Savory*, as set forth in the commencement of that count. In the third count it was stated, that the intestate retained the defendant generally, without describing him as an attorney. The fourth count was in more general terms. To these were added the common money counts. The defendant demurred generally to the first four counts, and the plaintiff joined in demurrer. The cause came on for argument this day, when

Mr. Serjt. *D'Oyley*, for Mr. Serjt. *Blosset*, in support of the demurrer, submitted, *first*, that assuming a right of action accrued to the intestate in his life-time, still, that it did not survive to the plaintiff as his representative; and *secondly*, that no sufficient cause of action was set out in the declaration. *First*, this is in principle and substance an action of tort for the misfeasance of the defendant, who was employed as an attorney to investigate the title of an estate to be conveyed to the intestate, and although it is framed in contract, the breach arises from a neglect of duty. The substance, and not the

form of the action must be considered. *Pinchon's* case (a) first established, that an action of *assumpsit* was maintainable against executors for the non-payment of money due from their testator, on the ground, that the testator could not wage his law. Although there may be an implied promise arising out of a contract, still, here, the misfeasance is the gist of the action; and it is a general rule, that if a person in the course of his professional employment, has been guilty of negligence, ignorance, or want of skill, the remedy is by action on the case in nature of *tort*, although it may involve a matter of contract. In *Slater v. Baker and Stapleton* (b) an action on the case was brought against a surgeon and an apothecary, for unskilfully disuniting a callous of the plaintiff's leg, after it had been set by them. The declaration there was framed on the breach of contract, and the defendants pleaded not guilty. No objection was there raised as to the action's amounting to a *tort*, but as there was no evidence of want of skill, it was insisted, that it should have been trespass, as the act was done without the plaintiff's consent, but the Court over-ruled the objection. The equitable construction of the statute 4 *Edw. 3. c. 7.* by which executors may have an action of trespass for a wrong done to their testator, does not apply to this case, as the operation of that statute has always been confined to instances where the testator had a defined and specific interest in the thing sued for, and the injury must be direct and immediate to his personal estate. The case of *Rutland v. Rutland* (c) is illustrative of this principle, where it was held, that an action of trover will lie by an executor, on a conversion of the testator's goods in his life-time, but a distinction is there drawn between the common law right and the statute 4 *Edw. 3. c. 7.*, and the case was decided on the ground that it came within the equity of that statute, if not, the action could not have been maintained;

1820.  
KNIGHTS  
v.  
QUARLES.

(a) 9 *Rep.* 87.—(b) 2 *Wils.* 359. See also *Buller's Nisi Prius*, 73. *Score v. Prentice*, 8 *East*, 348.—(c) *Cro. Eliz.* 377.



1820.  
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 KNIGHTS
 v.
 QUARLES.

but such action will not lie against an executor for a conversion by his testator, *Hambly v. Trott* (a).—[Lord Chief Justice Dallas.—It seems, that an executor may, in the right of his testator, maintain an action on simple contracts in writing, or not in writing, either express or implied (b).]—This case is wholly distinguishable from those of covenant, or contract, affecting the personal property of the deceased, as there a right of action descends to his representative at common law. In *Kingdon v. Nottle* (c), Mr. Justice Le Blanc said, that “the distinction which attends real and personal covenants with respect to the course in which they go to the representatives of the person with whom the covenants are made, is a clear one; real covenants run with the land, and either go to the assignee of the land, or descend to the heir, and must be taken advantage of by him alone; but personal covenants must be sued for by the executor.” So, in the breach of a precise contract, the effect would be the same, but it has always been considered otherwise, with respect to an implied contract, or tort arising out of such contract. Where there is a mere duty, the action will not survive, as in the case of deceit, which is in the nature of a personal tort, arising out of a contract. In *Bafield v. Collard* (d) it was held, that an administrator might maintain an action of *assumpsit* on a contract for the benefit of a third person, it being an injury to the personal estate of the intestate, as the consideration moved from him, and the promise was made to him. But there, the personal estate of the intestate was injured. A plaintiff cannot vary his right by adopting a particular form of action. The plea of Not Guilty is in substance the only good defence to this action, for it merely amounts to a wrong done to the person of the deceased in his life-time, and although it might be

(a) *Cowp.* 371.—(b) See *Toller on Executors*, 3d edit. 453, who cites *Com. Dig.* tit. *Administration*, B. 13. 3 *Bac. Abr.* 59. 92, in support of this position.—(c) 1 *Maule & Selw.* 365.—(d) *Aleyn.* 1.

carried so far as to be construed a contract, still, it could only be implied;—the breach of it did no direct injury to his personal property, but affected him only, and it therefore falls within the general rule, that *actio personalis moritur cum personâ*. Besides, if this were a contract, it relates immediately to the realty, and as the estate was not sold by the intestate in consequence of his being unable to obtain a sufficient title, it descended to the heir, and as he is the only person injured, the action should have been brought in his name, and not by the plaintiff as administrator. In *Lucy v. Levington* (a) it was resolved, that an executor might bring an action of covenant for quiet enjoyment on a covenant with the vendee, his heirs and assigns, as the eviction being to the testator, he could not have an heir or assignee of the land, and therefore that the damages belonged to the executor, though not named in the covenant, for he represented the person of the testator. There, too, the realty was gone, but here, the estate remains as it did during the life of the intestate, and his heir at law only is deteriorated. Secondly, the declaration is defective on the face of it, as there is no allegation, that the defendant professed to carry on the business of an attorney or solicitor, or that he undertook to ascertain Savory's title to the estate in that character, but merely, that the intestate employed him as such. If the intestate had chosen an indifferent or illiterate person, it would be his own act, and perfectly consistent with the averment in the declaration, for it is not stated, that the defendant conducted himself improperly, or carelessly, as an attorney, but merely, that he did not carefully investigate the title, or take due care that an improper one should not be accepted by the intestate.

1820.
KNIGHTS
v.
QUARLES.

Mr. Serjt. Frere, *contra*, was stopped by the Court.

Lord Chief Justice DALLAS.—The only question in this case is, whether the plaintiff, as administrator, can sue for a

(a) 2 Levinz, 26.

1820.

KNIGHTS
v.
QUANLES.

breach of contract stated to have been made by the defendant with the intestate in his life-time. It is expressly alleged in the declaration, that it was an injury to his personal estate during his life. It has been contended however, that the action is in substance founded in *tort*, although it is in form framed as being in the nature of a contract. But it has been admitted, and most properly, that it is immaterial whether it be in the form of *tort* or contract, as the substance only must be looked at. How, then, is the declaration framed? It states, that the defendant was employed by the intestate as his attorney to investigate the title of an estate to be conveyed to such intestate as purchaser, that the defendant faithfully promised so to do, and to cause a good title to be effectually conveyed to him. Then the breach assigned is, that he did not do so, but that in the life-time of the intestate, he caused him to accept a defective title without his knowledge, and in violation of the promise so made to him by the defendant, whereby a special damage had accrued to the intestate and his personal estate, as is fully set out in the declaration. It having been conceded by my Brother *D'Oyley*, that the form of the action makes no difference, there appears to me to be an end of the question. Can it for a moment be doubted, but that an injury was sustained to the personal estate of the intestate, by the defendant's not investigating the title? It is stated on the record that he promised to do so, and that a direct injury accrued to the intestate in his life-time, by his not being enabled to dispose of the estate, in consequence of the defendant's having accepted a defective title; that he was thereby put to great expence in endeavouring to obtain a good title to the premises, which became uncultivated and lessened in value. Besides, the defendant by demurring, has admitted the promise, as well as the allegation in the declaration, of an injury having accrued to the personal estate of the intestate in his life-time. With respect to the second objection, it is stated in the declaration, that the intestate retained and employed the defendant as his attorney and solicitor; that is quite sufficient.

I therefore feel no difficulty in saying, that the plaintiff is entitled to judgment.

1820.

KNIGHTS

v.

QUARLES.

Mr. Justice PARK.—I am of the same opinion. From the case of *Lucy v. Levington* to the present, it has been invariably holden, that where a contract has been broken, and a damage accrued to a testator in his life-time, that his executor may sue, although the breach of such a contract may arise out of, or relate to land. In that case as reported in *Ventris (a)*, it is stated, that “it was agreed by all the Justices (of whom Lord Hale was one), that though the covenant were made only to I. S. his heirs and assigns, and it were an estate of inheritance, yet, the breach being in the testator’s life-time, the executor had well brought the action for the damages.” That case was alluded to and its doctrine adopted by Lord Ellenborough in *Kingdon v. Nottle (b)*, but the distinction there taken by the Court was, that the damage was not stated to have accrued in the life-time of the testator. So, in *King v. Jones (c)* Mr. Justice Heath, in delivering the judgment of the Court, distinguished that case, from *Lucy v. Levington*, because in the latter the damage was sustained in the time of the ancestor. Here, however, it is expressly stated on the face of the declaration, that a damage accrued to the estate of the intestate during his life, as he was prevented from selling the premises in question, owing to the defendant’s not having taken proper care, in investigating the title of the person from whom they were purchased.

Mr. Justice BURROUGH.—A distinction has been attempted to be drawn in this case between an express or an implied contract, but it makes no difference whatever, as the whole of the transaction rests on contract. It is now too late to doubt, whether a person retained by another as an attorney, is not bound to do his duty in the course of such

(a) Vol. 1. 176. — (b) 1 Maule & Selw. 363. — (c) 1 Marsh. 112.

1820.

 KNIGHTS
 v.
 QUARLES.

professional employment. Such duty does not arise from an implied promise, nor does it form the subject of *tort* alone. But the defendant, being an attorney, expressly contracted with the intestate to investigate a title to an estate, of which the latter became the purchaser, on the faith of such investigation. If it should be held, that the plaintiff as administrator, could not maintain this action against the defendant, none whatever could be brought, although the intestate's estate had received a material injury through his carelessness and misconduct. It is quite clear, that an action for the injury sustained, could not be brought by the heir; for the contract of the defendant does not run with the land; still, if it did, the plaintiff, as administrator, would have a right to sue for the damage sustained in consequence by the intestate in his life-time. The declaration contains four special counts, in all of which, there is an express promise alleged by the defendant. This promise he has admitted by the demurrer, and the action is expressly founded on it, as being the substance of the contract. This therefore appears to me to be not only the proper but most convenient form of action. In *Atkins v. Hill* (a) it was held, that *assumpsit* lay upon a promise by an executor to pay a legacy in consideration of assets, as such promise was grounded on a good and sufficient consideration, viz. that the defendant had assets to discharge the legacy. But in *Deeks v. Strutt* (b), it was decided, that legacies were not recoverable at law, but only in equity. Here, enough is stated on the face of the record, to shew that a damage accrued to the intestate's personal estate during his life, and that the defendant expressly promised him to investigate and take due care that a proper title should be furnished;—it was therefore unnecessary to shew that such promise was made by the defendant in his professional character of an attorney.

Mr. Justice RICHARDSON.—Three objections have

(a) *Cowp.* 284. — (b) 5 *Term Rep.* 690.

1820.

 KNIGHTS
 v.
 QUARLES.

been raised as to the plaintiff's right to maintain this action; first, that it in substance arises out of a *tort*; secondly, that if it were a contract, it ran with the land, that the heir was damnified, and that he alone could sue; and, thirdly, that the declaration is defective in point of form. As to the first, this action both in form and substance is founded on a contract. No negligence can be imputed to the defendant, except on his retainer. Although the intestate himself might have brought an action of *tort* in his life-time, still, the injury he sustained, arose from a breach of contract. He might have elected to have sued the defendant either in *tort* or *assumpsit*, but the foundation of his action rested on contract. It is quite clear, that in cases of a promise made to a deceased, if an injury accrues to his personal estate by a breach of it during his life-time, that the right of action descends to his representative. It has been contended, however, that in the present instance the action died with the intestate. If a person contracts with a coach proprietor to be safely and securely carried from one place to another, and through the negligence of the servant of such proprietor, the coach be overturned, in consequence of which the passenger so contracting dislocates or fractures a limb, and owing to his confinement in procuring a cure, his personal property sustained an injury;—although he, during his life-time, might sue the proprietor in *assumpsit* or *tort*, still his representative may maintain an action on the contract after his death, to carry him safely, and recover damages for the injury which had accrued to his estate from the breach thereof. *Secondly*, if the heir alone could sue, no action whatever could be maintained against the defendant, for it was not a contract which ran with the land; and even if it did, and there were a breach of it, and a damage accrued to the intestate in consequence during his life, his representative alone could sue, according to the case of *Lucy v. Levington*. As to the last objection, it was alleged in the declaration, that the defendant was retained and employed by the intestate as his attorney. To

1820
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 KNIGHTS  
 v.  
 QUARLES.

this, the defendant has merely demurred generally, he has not therefore objected to the form of the allegation, and it must be implied that he was bound to fulfil his duty as such.

Judgment for the plaintiff.

Wednesday,  
 June 14.

TEALL v. AUTY and DIBB.

In *assumpsit* for goods sold, and on an account stated, to recover the value of growing poles purchased from the plaintiff by the defendants, and afterwards carried away by them; it appeared in evidence, that at the time of the bargain some memorandums in writing had been made, but which were neither stamped nor signed by the parties. It was also proved, that the defendants, after the poles were carried away, admitted that a balance was due to the plaintiff; un-

THIS was an action of *assumpsit* to recover 45*l.* being the balance of an account due to the plaintiff in respect of a large quantity of poles or young trees, sold whilst standing, and afterwards cut down, and delivered by the plaintiff to the defendants. The declaration contained counts for goods sold and delivered, the common money counts, and on an account stated. Plea, general issue.

At the trial of the cause before Mr. Justice *Bayley* at the last assizes at *York*, it appeared, that the plaintiff was a shipwright, and in the habit of purchasing growing timber, the largest of which he kept for his own use, and sold the smaller to third persons. That he had accordingly sold some growing poles to the defendants, the whole of which, after being felled by the plaintiff, were delivered to and carried away by them. For the plaintiff it was proved, that his original demand on the defendants for the poles in question, amounted to 181*l.* which had been reduced by payments to the above sum of 45*l.* That repeated applications had been under these circumstances the plaintiff was nonsuited:—Held, that such nonsuit was proper, as it was not proved that the defendants had admitted a precise and definite sum to be due to the plaintiff, and therefore that he could not recover on the account stated, without reference to the memorandums, which were not admissible in evidence; but as the contract had been executed by the defendants, they having carried away the poles, the Court granted the plaintiff a new trial on payment of costs.

made to them both for the payment of this sum, and that they had acknowledged a balance to be due to the plaintiff. On the cross-examination of one of the plaintiff's witnesses, it turned out that there was a memorandum in his pocket book, written by him at the time the bargain was made, but it was neither stamped nor signed by either of the parties, by which it appeared, that "on the 11th of *March*, 1818, *Teall* sold to *Auty* and *Dibb* all the small poles in a certain plantation therein named, under four feet measurement, at 1s. 4d. each. That the plaintiff was to be paid for them before the month of *February*, following; that he was to mark and fell the poles, and the defendants were to carry them away."—The plaintiff's hand-writing to this memorandum was about to be proved, when it was objected for the defendants that it was not admissible in evidence, as it was neither stamped nor signed by the parties, and that the action was not maintainable unless such a document had been duly made and executed, as it was a contract for the sale of standing trees, which were an interest in land, and to be considered as part of the realty. For the defendants, a similar memorandum was produced, in the hand-writing of the plaintiff, but not stamped or signed by either of the parties, in which the contract was stated to have been made with the defendant *Dibb* alone. The Learned Judge was of opinion, that the contract only could be looked at, which was not admissible in evidence, it being neither stamped nor signed by the defendants, and that the memorandum produced by them, induced a suspicion in his mind that the action had been improperly brought against both, *Dibb* only being mentioned therein. He accordingly directed a nonsuit, with liberty for the plaintiff to move to set it aside, in case the Court should be of opinion that he was entitled to recover.

Mr. Serjt. *Hullock*, in the last Term, obtained a rule *nisi*, that the nonsuit might be set aside, and instead thereof, a verdict entered for the plaintiff for 45*l*. He relied on *Knowles*

1820.

TEALL  
v.  
AUTY.



1820.

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 TRELL  
 v.  
 AUTY.

*v. Michel* (a), where the declaration was similar to the present, and no memorandum of a contract was given in evidence, and it was there held, that an admission made by the defendants, that they had bought standing trees of the plaintiff for a certain sum of money, after they had cut them down and carried them away, would support a count upon an account stated, though not for goods sold. He submitted in this case, therefore, that no written memorandum of the contract was necessary, as required by the statute of frauds. That, at all events, the paper produced by the defendants to shew that the trees had been sold to one of them only, could not have been received in evidence if it had been stamped, as it was not signed by either of the parties. But even if it could, the memorandum in the plaintiff's account book was liable to the same objection, where the names of both the defendants were mentioned and debited.

Mr. Serjt. *Vaughan* yesterday shewed cause, and insisted that the Learned Judge was perfectly correct in directing a nonsuit. When the poles were sold to the defendants, they were growing, and formed part of the realty. Neither of the documents containing the terms of the sale were admissible in evidence at the trial, as they had no stamps affixed to them, and on proof of their existence, no parol evidence was admissible. In *Waddington v. Bristow* (b) it was decided, that a written agreement for the sale of hops, which should be grown on a certain quantity of land, to be delivered in pockets at a certain place, could not be given in evidence, unless stamped with an agreement stamp, as they gave an interest to the vendee in the produce of the farm. In *Emmerson v. Heelis* (c) it was held, that the sale of a crop of growing turnips, for the removal of which no time was specified, was the sale of an interest in land; and in *Crosby v. Wadsworth* (d) where *A.*, by

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(a) 13 East, 249. — (b) 2 Bos. & Pul. 452. — (c) 2 Tenn. 32.  
 (d) 6 East, 602.

parol, agreed to sell to *B.* a standing crop of grass, and *B.* was to mow and make it into hay, but no time was fixed for the mowing, or for the payment of the money, nor was possession of the close given; it was still held to be a contract for an interest in lands, and required to be in writing under the statute of frauds. So here, there having been a contract in writing, parol evidence was not admissible, as the memorandums were the only evidence of the contract, neither of which could be received, as they were neither stamped nor signed by the plaintiff or defendants, or by any person authorised by the latter to do so. Besides, the action is brought against both the defendants; and it appears by the memorandum produced by them at the trial, that the contract was entered into with one only.

1820.

TEALL  
v.  
AUTY.

Mr. Serjt. *Hullock*, in support of the rule. Whether the contract was made with both the defendants or not, is, under the circumstances, no ground of nonsuit, but a fact which should have been left for the determination of the Jury. As to that objection therefore, the plaintiff is entitled to a new trial. With respect to the cases cited for the defendants, it is unnecessary to controvert or impeach the authority of either of them. The only question is, whether the plaintiff cannot sustain this action by evidence *aliunde*, independently of the memorandum made by him in his pocket book. Even if it were liable to a stamp duty, he might have recourse to the count on an account stated for the balance due to him, for it was proved at the trial that both the defendants admitted a balance to be due, and repeated applications were made to them by the plaintiff for payment. *Knowles v. Michel* is an express authority as to this point; at all events, he was entitled to recover on a *quantum meruit*. Here, in point of fact, there was no agreement in writing, for it cannot be considered as such, within the fourth section of the statute of frauds, as amounting to an interest in land, because it was not signed by either of the parties

1820.

~  
 TRELL  
 v.  
 AUTY.

to be charged or their agent. As therefore it was not an agreement within that statute, it could not be rendered available as such by affixing a stamp to it. The only distinction between this case and that of *Knowles v. Michel*, is the precise sum the plaintiff is entitled to recover. The defendants admitted a balance to be due to him, after having executed the contract on their part by taking away the poles. In that case, it is true, there was no evidence of an agreement, and as the memorandum in question did not amount to one, the plaintiff had a right to recover the balance on the account stated. If it had been signed by the defendants, or any person authorised by them, it would have been a different question—but as they had carried away all the poles, and thereby executed the contract on their parts, it must be considered as if no written memorandum had ever existed, and the plaintiff is entitled to recover the balance due to him on the evidence given at the trial, under the count upon an account stated.

Lord Chief Justice DALLAS.—It has been proposed, in this case, that a verdict should be entered for the plaintiff for 45*l.*, being the sum remaining due to him from the defendants, on account of the poles in question. The Court are anxious to render every accommodation, consonant with justice, to the parties. It appears that the defendants agreed to purchase the poles, and that they afterwards caused them to be taken away. It is quite clear, therefore, that they ought to pay for them; but the main question is, whether the nonsuit was proper? We are of opinion, that the learned Judge was perfectly right in directing the plaintiff to be called, and we feel no difficulty whatever on that point. But what are the facts? The agreement was originally for the purchase of an interest in land, for when it was made, the poles were growing. If, therefore, the action had been brought to enforce that contract, the objection as to the memorandum's not being admissible in evidence at the trial, it being neither stamped, nor signed by the con-

tracting party, would be a good and valid objection; but whatever the original contract might have been, the poles were severed by the plaintiff, and afterwards taken away by the defendants. The agreement was then executed, as they had all the benefits they could possibly derive under it; and it has been established by a number of cases, that where an agreement has been executed, the party is entitled to recover, although he would not, in case he had commenced an action on such contract before it had been so executed. Here however, it has been contended, that the plaintiff is entitled to recover on the account stated. If it had been proved that a certain sum was agreed to be paid by the defendants, as the balance due to the plaintiff, the case of *Knowles v. Michel* would be expressly in point; but there, the defendants admitted a precise sum to be due. That case, therefore, does not meet the present, in which the difficulty is, to ascertain what is due, no promise having been proved by the defendants to pay a definite and certain sum, but merely the balance due from them to the plaintiff. The promise might have been made with reference to the memorandum, which not being stamped, was not admissible in evidence; for in *Brewer v. Palmer* (a), which was an action of *assumpsit* for use and occupation, and it appeared, on the examination of a witness, that the defendant held under a written agreement, Lord Eldon decided, that it could not be received in evidence, for want of a stamp, and the plaintiff was not allowed to go into general evidence, as the agreement was the best evidence of the nature of the occupation, and where there is an actual contract, none can be implied. At all events, the plaintiff could only be entitled to recover under the count on an account stated, and as no fixed sum was proved to have been admitted by the defendants to be due to him, the nonsuit was proper. Under all the circumstances, however, we think that a new

1820.

TEAL.  
v.  
AUTV.

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(a) 3 Esp. 213.

1820.

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 TRELL  
 v.  
 AUTV.

trial may be granted to the plaintiff, on the payment of costs, as he might have been enabled to prove the exact amount due to him from the defendants by evidence, independently of the agreement. If such evidence had been given at the trial, the plaintiff would have been entitled to recover on the account stated. The Court, however, will make enquiry of the learned Judge who tried the cause, as to the general tenor of the evidence, and the facts as proved.

*Adjournatur.*

Mr. Justice PARK on this day stated, that he had spoken to Mr. Justice Bayley, who had no recollection of any evidence being tendered at the trial, to shew an admission by the defendants, that any definite sum was due from them to the plaintiff; but the Court still thought that he was entitled to a new trial, on the payment of costs, and on these terms made the

Rule absolute for a new trial (a).

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(a) So, in *Res v. St. Paul's Bedford Inhabitants*, 6 Term Rep. 452, it was decided, that to enable an apprentice to gain a settlement, by serving a second master, the service must be performed with the consent of the first master; and if the agreement between the first and second master, expressing such consent, cannot be received in evidence for want of a stamp, parol evidence of the agreement cannot be admitted. But, in *Doe, d. Wood v. Morris*, 12 East. 237, where the plaintiff's witness having proved payment of rent, said, on cross-examination, that an agreement in writing relative to the lands in question, had been produced on a former trial between the parties, but he did not know the contents of it; and another witness proved, that he had seen such agreement in the hands of the plaintiff's attorney that morning; yet, as no notice had been given by the defendant to produce the agreement, the Court held, that this general evidence was not sufficient to exclude the parol evidence of payment of rent, or to rebut the inference of a tenancy from year to year arising from it. So, in *assumpsit* for a crop of peas bargained and sold, where it was proved that there had been a written agreement between the parties, on the subject of the action, and that it was not stamped, the Court held, that no secondary evidence could be received of its contents, although it appeared to have been destroyed by the wrongful act of the party who took the objection. *Rippiner v. Wright*, 2 Barn. & Ald. 478. But where an unstamped agreement, for the purchase of a lease, was drawn up, but not signed by either of the parties, it was holden, that this did not prevent the party suing upon it from resorting to the common counts. *Adams v. Fairbairn*, 2 Stark. 277.

1820.

## IN THE EXCHEQUER CHAMBER.

MONKHOUSE, WRIGHT, and FAIRBAIRN, v. HAY and  
Another, Assignees of MATTHEWS, a Bankrupt.—  
(In error.)

Saturday,  
June 17,

THIS was an action of *assumpsit* for money had and received by the defendants below (plaintiffs in error), to the use of the plaintiffs below (defendants in error), as assignees of *Thomas Matthews*, a bankrupt.—Plea, General Issue.

The Ship Register Acts 26 Geo. 3. c. 60. and 34 Geo. 3. c. 68, do not tend to repeal or prevent the operation of the statute 21 Jac. 1. c. 19. s. 11, on British registered ships:—Therefore, where the owner of a ship assigned his interest in her to J. S., by deed, who became the registered owner, but by his permission, the owner continued to have the ship in his possession, and exercised all acts of ownership over her, until he became bankrupt:—Held, that the property in the ship passed to the assignees of such owner, although the register was duly indorsed to J. S. before the act of bankruptcy.

A special verdict found, that on the 11th of *May*, 1816, a commission of bankrupt was issued against *Matthews*, on an act of bankruptcy committed by him in *December*, 1815; and that on the 19th of *June*, 1816, an assignment of his property was duly made to his assignees (the defendants in error). That the bankrupt was the sole owner of a ship called the *Dolphin*, which was duly registered at the Custom-House at *Sunderland*, and that he was indebted to the defendants below in the sum of 795*l.* 14*s.* 3*d.*; that on the 22nd of *November*, 1815, an indenture of bargain and sale (reciting the certificate of the registry of the ship), was made and executed by *Matthews*, and *Fairbairn* (one of the defendants below), by which the former assigned the *Dolphin*, then at sea, to *Fairbairn*, to hold the same to him, in trust for sale, as security for the said sum of 795*l.* 14*s.* 3*d.* so due to him and his co-partners (the defendants below), if it were not paid on or before the 22nd of *May*, 1816. Then followed provisoes by *Matthews*, that the receipt of *Fairbairn* should discharge the purchaser of the ship; that he (*Matthews*) had full power to assign her; and that he would keep her insured until the payment of the sum in question.

1820.  
MONKHOUSE  
v.  
HAY.

The deed then contained a covenant by *Fairbairn* to re-assign the ship to *Matthews*, on payment of the above sum. And lastly, it was agreed and declared between both the parties, that until the ship should be sold under the trust contained in the deed, "it should be lawful for *Matthews* to have, hold, and enjoy the same, and to receive and take the gains and profits thereof, to and for his own use and benefit, without the lawful let or interruption of *Fairbairn*, or any person claiming under him." The special verdict then found, that a copy of this deed was delivered on the said 22nd of *November*, 1815, to the proper officer at the Custom-House at *Sunderland*, who duly made the entries thereof, as required by the Register Acts. That at the time of the execution of the deed, the ship was at sea, but returned to *Sunderland* a few days afterwards; that on the 29th of *November* (being within ten days after her return), the proper indorsement was made on the certificate of the registry, and a copy thereof delivered to the proper officer, at *Sunderland*, who duly made the entries thereof at the Custom-House there. That on the 31st of *January*, 1816, the ship was brought to the port of *Newcastle*, where *Fairbairn* then resided, and that he procured a new register for her, in his own name, at the Custom-House there; that notice thereof was given to the proper officer, and the old certificate was delivered up and cancelled. That at the time of the execution of the deed of assignment, *Matthews* had possession of the ship (being then at sea); that he appointed different masters, employed her in different voyages from time to time, received the freight earned on such voyages, and, in *April* 1816, chartered her for a voyage to *Cardiff*. gave all the orders to the masters, did all the necessary repairs to the ship from time to time, at his own cost, and insured her in his own name, but that she was navigated under the certificate of registry so indorsed and granted to *Fairbairn*, in compliance with the Register Acts. That the

defendants below did not, nor did any of them, interfere in any way with the possession, conduct, or management of the ship, until the 1st of *June*, 1816, when the ship, which had sailed from *Cardiff* on the 16th of *May* preceding, arrived at the port of *London*, on the 30th of that month. That the agents of the defendants below, on hearing of her arrival there, did, on the said 1st of *June*, take possession of her, displace the then master from the command, and re-appointed him as such, under the defendants below, and sent the ship to them at *Newcastle*. That part of the sum secured by the deed had been paid by *Matthews*, before he became bankrupt, and that the demand of the defendants below upon the ship, was thereby reduced to 595*l.*; and that they, after they took possession of her, sold her, and that the clear proceeds, remaining in their hands, at the time of the commencement of the present action, amounted to 585*l.*—But whether, &c. (a).

1820.  
MONKHOUSE  
v.  
HAY.

The case came on for argument this day, when Mr. *James Parke*, for the plaintiffs in error, submitted, first, That since the passing of the Register Acts, the statute 21 *Jac.* 1. c. 19. s. 11, was no longer applicable to *British* ships; and, secondly, That enough is not found on this special verdict to entitle the defendants in error to recover, and therefore, that there must be a *venire de novo*. First, In *Jones v. Dwyer* (b), it was decided, that the statute of *James* only vested in the assignees such goods as the bankrupt had in his possession at the time of his bankruptcy. But mere possession of the property by him, is not sufficient to entitle his assignees to recover, unless he has also the reputed or apparent owner-

(a) See a report of this case in the *King's Bench*, 2 *Barn. & Ald.* 193, *nomine Hay v. Fairbairn*, in which judgment was given for the plaintiffs below, on a special case, founded on the above circumstances, and which was turned into the present special verdict.

(b) 15 *East*, 21.



1820.

MONKHOUSE  
v.  
HAY.

ship, or has taken upon himself the sale, or disposition thereof as owner. In *Lingham v. Biggs* (a), Lord Chief Justice Eyre said, that "Being allowed to have possession of goods, under circumstances which give the reputation of ownership, brings the case within the statute. If a man be the reputed owner of goods, and appear to have the order and disposition of them, he must be understood to have taken upon himself the sale, order, and disposition within the meaning of the statute." It is therefore not sufficient to shew a mere possession of goods, as in the cases of ready-furnished lodgings, or job horses let to hire, but there must be also an apparent power of selling. Since the passing of the Registry Acts (b), British ships cannot be transferred without documentary evidence of a title, and are not like the ordinary cases of goods which pass by parol and mere delivery, or by sale, as being in the possession of a warehouseman, so as to give him an apparent right of ownership. But the registry is the only conclusive evidence of the property in a ship, and by which alone the title can be ascertained (c); and Lord Eldon there said (d), that "the consequence, established by positive and repeated decisions, is, that upon the contract for a purchase of a ship, which it may be supposed might have been executed without further mischief, though by force of that contract, and by operation of law, the pur-

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(a) 1 Bos. & Pul. 67.

(b) 26 Geo. 3. c. 60. s. 17, By which it is enacted, that "when the property in a vessel belonging to any of his Majesty's subjects, shall be transferred to any other of such subjects, in whole or in part, the certificate of the registry of such ship shall be truly and accurately recited, in words at length, in the bill of sale, and that otherwise it shall be void." And by 34 Geo. 3. c. 68. ss. 15, 16, it is enacted, that "on the alteration of property in vessels in the port to which they belong, the indorsement on the certificate of registry is to be made in a certain form, therein expressed and set out, and that if vessels be absent from the port to which they belong, when an alteration in the property in them shall be made, that the sale must still be made as was directed in the case of vessels being in port."

(c) *Ex parte Yallop*, 15 Ves. 60. — (d) *Id.* 67.

chaser would be the owner in equity from the moment of the purchase, and the vendor, from that moment, would be divested of all interest; yet, it is decided, that these acts are so imperative, that if they rest upon the contract, it cannot be said of a ship, as of an estate, that by operation of law, and by force of the contract, the ownership is changed, and if the money had been paid, the decision would be upon the same principle, and it must be recovered by another form of proceeding;"—and he concluded by observing (a), that "the question was, whether the title, being of a public registered nature, that public registry must not decide, as among all mankind, where the property is? and his Lordship's opinion was, that the registry was the evidence of the property, and must be taken to be so, even among the creditors." Although, in *Stephens v. Sole* (b), Lord Chancellor Talbot decreed, that the statute of *James* extended to ships or hoys, as well as to other property, still, in *Ryall v. Rolle* (c), it was held, that though the words of the statute are general, they do not extend to chattel interests in lands; and Mr. Justice Burnet there explained the reason, in the following terms: "As to the possession of goods, I have no way of coming to the knowledge of the owner, but by seeing who is in possession of them; but the possession of land is of a different nature; for a man may be in possession of land, as a tenant at will, as a mortgagor is to the mortgagee before the condition broken. A purchaser may call for the title deeds, and need not be deceived unless he will." So, in *Gordon v. The East India Company* (d), Lord Kenyon said, that "in the case of real property, no purchaser is satisfied with the mere possession of an estate—before he purchases, he calls for the title deeds, and examines whether or not the possessor be entitled to the estate." The Register

1820.

MONKHOUSE  
v.  
HAY.

(a) 15 Ves. 71.——(b) Cited 1 Ves. jun. 352.——(c) 1 Atk. 168.  
(d) ? Term Rep. 234.

1820.  
  
 MONKHOUSE  
 v.  
 HAY.

Acts, therefore, put registered ships on the same footing as chattel interests in land, as the register must be looked at to ascertain the title, and no one can safely become the purchaser without resorting to it. Besides, the operation of the statute of *James* must not now be extended, as, when it was framed, the operations of trade were simple. Since that period, they have been extended, and become more complicated. Factors and agents of different descriptions have been introduced in all mercantile transactions, and therefore the same credit is not now given to apparent possession. In *Robinson v. M'Donnell* (a), where, after a bill of sale duly executed and registered, the assignees of the vendee (who had become bankrupt since the sale), took possession of the ship, notwithstanding a parol agreement that the vendors should continue in possession; it was held, that if the vendors had become bankrupt during such possession, the vessel would have passed to their assignees, as property in their order and disposition, within the statute 21 Jac. 1., but that the bankruptcy of the vendee having first intervened, and the assignees of the latter having obtained possession, the assignees of the vendor could not support the action to recover it; and Mr. Justice *Bayley* there observed (b), that "the statute of *James* applies only, where the order and disposition remain with the bankrupt up to the time of his bankruptcy." When the former case of *Robinson v. M'Donnell* (c) was mentioned in *Hay v. Fairbairn* (d), the Court observed, that it might be re-considered thereafter, if necessary. That case, therefore, ought not to operate here, as the object of this special verdict was to review both those decisions.—Secondly, The Jury have come to no conclusion by their verdict, whether the reputed ownership was in the bankrupt, or not. Lord Chief Justice *Eyre*, in

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(a) 2 Barn. & Ald. 134. — (b) *Id.* 137. — (c) *Trin. Term*, 56 Geo. 3. not then reported. — (d) 2 Barn. & Ald. 195.

*Lingham v. Biggs*, said (a), that "it was well observed by Mr. Justice Buller, in *Walker v. Burnell* (b), that questions on the statute 21 Jac. 1. have much more of fact than of law in them." Here, the Jury have found conflicting evidence of ownership between the bankrupt and the plaintiffs in error; and there is no weight of evidence to shew that the former was in the apparent or ostensible possession of the ship at the time of the bankruptcy. [Lord Chief Justice Dallas. In *Horn v. Baker* (c), which was a case of reputed ownership, as to stills and other utensils, for the purpose of carrying on the bankrupt's business, Mr. Justice Lawrence said, that "the Court were rather called upon to consider as upon a motion for a new trial, what conclusion the Jury should have drawn from the evidence, than to consider a dry question of law."] If, as in *Frazer v. Marsh* (d), the registered owner had chartered the ship to the then captain at a rent for a certain number of voyages, the Jury would be bound to say, who was the reputed owner at the time of the bankruptcy. They were equally bound in the present case, but they have not found which weight of evidence preponderates. The certificate of register was on board the vessel. They should have found that fact, at all events; and in *Muller v. Moss* (e) Lord Ellenborough said, that "reputed ownership is a fact which ought to have been found to raise the question at all."

1820.  
MONKHOUSE  
P.  
HAY.

Mr. Tindal, *contra*.—Although an objection has been made as to the sufficiency of the finding in this special verdict, it still embraces the same question as was raised in *Hay v. Fairbairn* in the Court below, and it was there said after argument, that reputed ownership was a mixed question of law and fact. In the cases of *Mace v. Cadell* (f), and *Horn v. Baker* (g), the fact of apparent ownership was not

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(a) 1 Bos. & Pul. 89.——(b) 1 Doug. 320.——(c) 9 East, 243.  
(d) 2 Campb. 517. S. C. 13 East, 238.——(e) 1 Maule & Selw. 330.  
(f) Corp. 232.——(g) 9 East, 215.

1620.  
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 MONKHOUSE
 v.
 FAY.

stated to be in the bankrupt, but it was left to the Court to decide, whether, under the circumstances, it were or not. So, here, the facts as stated on the record, raise a question whether the bankrupt was the reputed owner or not. If the Jury had found that he had the disposition of the ship by the consent of the owner at the time of his bankruptcy, *cadit questio*!—As however, she was navigated under a certificate of registry, which had been granted to one of the plaintiffs in error, but was in fact in possession of the bankrupt at the time, there is enough stated in this verdict to raise the point, and entitle the defendants in error to recover. But the main question, however, is, whether the statute 21 Jac. 1. c. 19. be repealed by the Register Acts. It has been contended, that the provision contained in the eleventh section of that statute does not apply to *British* ships. But these later acts do not endeavour to prevent the operation of that clause, and unless they tend directly to repeal its effect, it remains in full force, as no middle course can be adopted. They refer to a distinct subject-matter, and are wholly independent of the statute of *James*, for they merely provide the mode by which property in *British* ships may be transferred by one person to another by their own acts, so as to exclude foreigners from having any interest in them, whereas, the object of the statute of *James*, was to prevent false credit, and render goods in possession of a bankrupt as a reputed owner, equally distributable to his creditors as other property in his actual possession. There is nothing in the Register Acts to touch the policy of that statute, and consequently no distinction can be drawn between ships and any other personal property of the bankrupt, for the false credit raised by the one, is equally dangerous, and as much to be guarded against, as the other. It has been said, that the possession by the bankrupt after his bankruptcy, is of no consequence. That however must be confined to a period shortly after the bankruptcy took place, but here, the length of possession and complete management of the ship by the bankrupt so long after

the transfer was made, are sufficient grounds to establish a reputed ownership by him. It has been further contended, that the registry only must be looked at, and not the owner of the vessel, as the former is the only evidence of the title; but, if a question were to arise as to whom goods or stores were furnished for the use of a vessel, the person who chartered her, or ordered them, or acted as owner, would be liable on proof that the goods were supplied to him, and that he acted in such a capacity; and the documentary title need not be looked at to render such person responsible. It is quite clear that chattel interests in lands do not come within the provision of the statute of *James*, as the words of that act are confined to *goods and chattels*, the possession and power of disposing of which are the only evidence of ownership, and to which persons dealing with traders generally look. Besides, on the facts found in this case, it falls expressly within the spirit and meaning of that statute. In *Ex parte Matthews* (a) Lord *Hardwicke* held, that a mortgage may be made of a ship at war, and if the mortgagee takes all methods in his power to get possession, such as bill of sale, &c. it will be out of the statute of *James*, otherwise no security could be made of a ship at sea; but the suffering the ship to come back and go on another voyage made it a very different case.—[Lord Chief Justice *Dallas*.—If the ship be at sea, a creditor must take possession immediately on her return to port, for if he neglects to do so, or permits her to go on a second voyage, it will be within the operation of the statute.]—In *Ex parte Batson* (b) the Lord Chancellor said, “if the ship had been chartered from *A.* to *B.* with liberty to touch at a port in *England*, has it ever been held, that the mortgagee was bound to give notice? If, then, there had been a new voyage, commenced under the authority of the original mortgagors, it would have made the case quite different. The invoice was

1820.
 MONKHOUSE
 v.
 HAY.

(a) 2 Ves. Senr. 272.—(b) 3 Broun's Chan. Cas. 362.

1820.
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 MONKHOUSE  
 v.  
 HAY.

for a voyage, beginning from *A*. When the ship was chartered, &c. the voyage began, it would be difficult to take possession, and notice to the captain would be to stop the voyage." In *Ex parte Yallop* (a) the Lord Chancellor formed no decisive opinion, but gave the party liberty to file a bill. But in a subsequent case, he expressed his approbation of *Robinson v. M'Donnell*, and decided on its authority. The reasoning of Lord *Ellenborough*, as stated to have been given in *Robinson v. M'Donnell* is not only extremely strong, but renders that case undistinguishable from the present (b) as the Court were decidedly of opinion, that "the Register Acts did not repeal the statute of *James*; that they did not affect titles passing by operation of law, as to executors or administrators in case of death, or to assignees generally in cases of bankruptcy or insolvency. That in these cases a title might be transmitted without these forms required by the statute; and that if a title might be so transmitted without these forms in cases of bankruptcy generally, they saw no reason why it might not be so done in a particular case falling within the scope and operation of the statute of *James*." The present case therefore, is not only within the mischief intended to be remedied by that statute, but one of the strongest that has arisen upon it. The last clause in the deed of assignment clearly shews, that the ship was in the possession of the bankrupt until the sale, as he was not only to be permitted to have and hold her, but to receive and take the profits for his own use and benefit. He, therefore retained the possession by the consent of *Fairbairn*, and the object of the deed was, that although the interest in the vessel had been assigned to him, still, that the credit of the bankrupt should not be injured in the eyes of the world;

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(a) 15 *Ves.* 68.

(b) 5 *Maule & Selw.* 228. That case was not reported at the time of the argument, but the learned counsel referred to it, as stated in the argument in *Hay v. Fairbairn*, 2 *Burn. & Ald.* 193.

and more particularly so as there was a probability that he would gain sufficient by the voyage to redeem his pledge and satisfy his creditors. In *Montagu's Bankrupt Laws* (a), it is stated, that "the registry is not conclusive evidence of the reputed ownership, but may be negatived by the proprietor's permitting the possessor to have the order and disposition as reputed owner;" and in support of that position it is stated in a note (b) to be contrary to *Ex parte Yallop*, and *Ex parte Houghton* (c), but decided contrary at law, and recognized by the Lord Chancellor in a case not yet reported. It was *Ex parte Hill*, in *re Robinson and Co.* and in *re Sharpe and Sons*, August and November, 1818.

1820.  
  
 MONKHOUSE  
 v.  
 HAY.

Mr. Parke, in reply.—It has been said, that a mischief would arise, if persons who supply a ship with stores or necessaries, or furnish her with repairs, should not be entitled to recover against the owner, without being obliged to look into the registry, as being the only evidence of title. But the furnishing such supplies depends on a particular contract between the parties, and the person who represents himself to be the owner is consequently liable as such. The statute of *James* applies only to the transfer of property by parol, but not by a deed, which is required to be publicly registered, and to which all the world may resort, for the purpose of ascertaining the title of the party. Besides, that statute applies only to those who have the power to sell, which in this case belonged to *Fairbairn* as the holder of the certificate of registry. *Hay v. Fairbairn*, and *Robinson v. McDonnell*, are the only cases applicable to the present, and it is now to be considered whether the doctrine laid down in them is to be impugned. At all events, if the special verdict be not defective in form, it is in substance:—It is found therein, that the vessel was navigated under the certificate of registry which had been granted to *Fairbairn*, in compli-

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(a) 2d edit. 563. — (b) *Id. ibid.* — (c) 17 Ves. 251.



1820.  
MONKHOUSE  
v.  
HAY.

ance with the Register Acts; and that the bankrupt was to continue in possession until the sale. If the documentary evidence were out of the question, the Court might enquire in whom the reputed ownership was. So, if this had been the case of a foreign ship, and it was stated that she was transferred by deed, and that the bankrupt continued to order her repairs, he might be considered as the apparent owner; but the Registry Acts require a public written document, and not a mere private deed between the parties. The Jury therefore should have formed a conclusion whether the reputed ownership was in the bankrupt or not. As to the last clause in the deed, it merely permits the bankrupt to hold the ship, but he has no power to sell or have possession of the certificate of her register. How, therefore, can he be considered as the reputed owner when the register is the only evidence of the title? If the vessel had been leased by the true owner for three months, and the lessee had become bankrupt, that would not be conclusive on such owner, but the question for the Jury would be, whether the bankrupt was the reputed owner at the time of the bankruptcy. Here, however, the legal title was conveyed to *Fairbairn*, and he accordingly obtained a new certificate of registry in his own name, and whether he or the bankrupt be the reputed owner was a question for the Jury to decide, and not the Court.

Lord Chief Justice DALLAS.—The general point in this case is, whether the ship in question was in the possession of the bankrupt, or can be taken to have been in his order and disposition at the time of his bankruptcy, with the consent and permission of the true owner and proprietor? To this, two objections have been raised, first, that the reputed ownership should have been found by the Jury on the face of the special verdict, that it has not been found, nor are any facts stated therein from which the Court can draw an inference of such ownership; and secondly, that the possession by the bankrupt at the time of his bankruptcy, did not constitute a

reputed ownership within the eleventh section of 21 Jac. 1. c. 19. As far as regards such ownership, what are the facts? The vessel was at sea, and transferred by deed to *Fairbairn*. This deed contained an express stipulation by him, that the bankrupt was to have, hold, and enjoy the ship and take the profits for his own use. He had the possession when the deed was executed, and continued to exercise all acts of ownership over her until his bankruptcy. It is impossible therefore, to conceive a stronger case of apparent possession, continuing in the bankrupt up to the time of his bankruptcy. There can be no doubt, but that in a common case, and independently of the Register Acts, the property in the vessel would have passed to his assignees. In the case of a transfer of a ship at sea by bill of sale, of which an absolute delivery of possession cannot be made, it is sufficient, if the proper documents are delivered, that the purchaser may be enabled to reduce the property into possession on the arrival of the ship in port. This the defendants in error, as assignees of the bankrupt, did, as soon as they were enabled to do so, under the commission. As far therefore as their conduct could affect the property, it passed to them. The question, therefore, comes round to this single point, whether the Register Acts alter the effect of, or repeal, the statute of *James*? They were passed with a view to very different objects, and the Court below has drawn a distinction as to their affecting titles passing by the operation of law. These statutes relate only to conveyances between vendor and vendee in cases of real ownership, but the statute of *James* was passed to prevent tradesmen from being injured by false credit, derived from apparent ownership. The latter, from its very term, stands in opposition to a case of real ownership, and therefore cannot fall within the meaning of the Register Acts. Here, the title of the assignees is most expressly rendered operative by the statute of *James*, as the vessel continued in the possession of the bankrupt with the consent and permission of the true owner; and as being in his possession at the time of

1820.

MONKHOUSE  
v.  
HAY.

1820.  
MONKHOUSE  
v.  
HAY.

his bankruptcy, it became the property of his assignees as soon as the commission was sued out by the operation of law. I perfectly agree with my Lord *Ellenborough*, that “(a) the Register Acts do not affect titles passing by operation of law, as to executors or administrators in case of death, or to assignees generally in cases of bankruptcy. That in these cases a title may be transmitted without any of the forms required by the statute, and that if a title may be transmitted without these forms in cases of bankruptcy generally, there is no reason why it may not so be done in a particular case falling within the scope and operation of the statute of *James*.” That is the true ground on which these cases are to be distinguished. This is not a transfer of property as between a vendor and vendee, but as between assignees and a bankrupt, who has been permitted to keep possession of the vessel in question, with the consent of the owner. As to the point, whether the facts are sufficiently stated in the special verdict to leave the question of reputed ownership to be inferred by the Court, we are of opinion, that in point of law, the conclusion to be drawn is, that the property in the vessel continued in the possession of the bankrupt with the consent of the owner. The reputation of ownership arises from the fact of the bankrupt’s having the possession of goods, with the consent of the true owner or proprietor. It is sufficiently found by this special verdict, that the bankrupt had such a possession, and we think that the sole order and disposition of the ship vested in him, and consequently that the judgment of the Court of King’s Bench must be

Affirmed (b).

Mr. Justice *Richardson* was absent, having been engaged as counsel in the cause in the Court below.

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(a) See *Hay v. Fairbairn*, 2 Barn. & Ald. 196. *Robinson v. M'Donnell*, 5 Maule & Selw. 239. — (b) See 2 Barn. & Ald. 196.

1820.

## IN THE EXCHEQUER CHAMBER.

HOME v. Lord FREDERICK CAVENDISH BENTINCK.

Saturday,  
June 17.

THIS was an action for a libel. The first count of the declaration stated, that before and at the time of committing the several grievances thereafter mentioned, the plaintiff was a Lieutenant-Colonel in his Majesty's army, and was possessed of, and enjoyed the commission of Captain of the 3d Regiment of Foot Guards, and that as such officer he was entitled to, and received a certain annual stipend of 1000*l*. That he had been engaged in partnership with divers other persons in a certain mining adventure, which was carried on under the firm of *Salisbury and Co.* That a bill had been filed in the Court of Chancery against the plaintiff, upon which an injunction had been obtained, restraining him from accepting or indorsing bills of exchange in the name of the persons so trading as aforesaid; and that the plaintiff had never been guilty, or suspected to have been guilty of any unfair, dishonest, or improper conduct in the said partnership transaction, or otherwise, or of any wilful or fraudulent secreting or withdrawing himself from the service of any process of the Court of Chancery, or of any other improper or unworthy conduct, but on the contrary, had always hitherto conducted himself in a fair and honest manner in his transactions with his said partners, and in all other transactions and concerns, and in every respect in a manner worthy of his character and situation as a gentleman, and an officer in his Majesty's service; and that he thereby had deservedly obtained the good opinion of all the good and worthy subjects of this realm to whom he was in anywise known. Yet, that the defendant greatly envying the happy state and condition of the plaintiff in his good name,

Where the Commander in Chief directed a military enquiry to be held to investigate the conduct of a commissioned officer in the army, who afterwards sued the President of such Court of Inquiry, for a libel, stated to be contained in his report, and transmitted by him to the Commander in Chief:—Held, that such report was a privileged communication, and properly rejected as evidence at the trial, and that an office copy thereof was inadmissible.

1820.  
  
 HOME  
 v.  
 BENTINCK.

fame, and credit, and to bring him into public scandal, infamy, and disgrace, with and amongst all his neighbours and other good and worthy subjects of this kingdom, and to cause it to be suspected and believed, that he had been guilty of dishonest and unfair dealings with respect to the said partnership concerns and otherwise, and that he had wilfully withdrawn himself from being served with process out of the Court of Chancery, and had endeavoured to procure himself to be personated by some other person; and had been guilty of other ungentlemanly and un-officer-like conduct, and further to vex, harass, and oppress the plaintiff, and to cause him to be deprived of his commission, and the profits accruing to him therefrom, and wholly to ruin him, falsely, wickedly, and maliciously, composed and published of and concerning the plaintiff as such officer, and of and concerning the said partnership concern, and his conduct therein, and of and concerning the service of the said injunction, a certain false, scandalous, malicious, and defamatory libel, containing amongst other things, the false, scandalous, and defamatory matter following, (that is to say)—that “the plaintiff (a), as appears by his letter marked No. 3 (b), expressed himself perfectly satisfied with, and gave his consent to any arrangement that might be made by the managing partner of that concern (meaning *Salisbury's* concern):—That, notwithstanding an agreement entered into by the co-partners, that no one but the managing partner should draw or indorse bills, the plaintiff's brother, *David Home*, did draw bills to a larger amount than the sum vested by plaintiff in the said concern, which bills were accepted by the plaintiff on the firm of *Salisbury and Co.*:—

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(a) The libel was set out with the usual innuendoes.

(b) This letter was dated the 29th July, 1814, written by the plaintiff and addressed to *Salisbury*, in which the former stated, that being on the point of departing for some months on the continent, he was ready to enter into any purchases already made for the benefit of the concern, and agreed with his (*Salisbury's*) better judgment and knowledge of these matters, and that he (the plaintiff) was very much pleased with the favourable accounts of the proceedings.

That the plaintiff took measures to avoid receiving personally the Lord Chancellor's injunction, restraining him from drawing, accepting, and indorsing bills on the house of *Salisbury and Co.*, which injunction the plaintiff prevailed upon Quarter-Master *Weston*, of the 3d Guards, to receive in such a manner, as to induce the person sent to serve it, to believe that he had actually served it upon the plaintiff:—Thereby meaning, that he had conducted himself dishonestly, and with a breach of good faith towards his partners, and in a manner unworthy of his character and situation as a gentleman and officer of the army, in avoiding the service of the writ of injunction. There were six other counts setting out different parts of the libel. The last count stated, that whereas the defendant was appointed, together with six other persons, by the Duke of *York*, Commander-in-Chief of his Majesty's Forces by land, to inquire into the conduct of the plaintiff in the said mining adventure, in the first count of the declaration mentioned, and that the defendant was appointed to preside at the deliberations of the said persons, and to report to the said Duke, the opinion of the said persons, touching the conduct of the plaintiff in the said mining adventure; and although it was the duty of the defendant to report truly the opinions of the said persons, yet that the defendant well knowing the premises, but wrongfully intending to injure the plaintiff in that behalf, and to deprive him of the countenance and good opinion of the Duke of *York*, did falsely, deceitfully, and injuriously publish, suggest, and represent to the Duke of *York*, that the said persons so appointed as aforesaid, had unanimously agreed in certain opinions, there following, of and concerning the plaintiff as such officer, and his conduct in the said mining adventure (that is to say), "*first*, that the plaintiff became a partner in the firm of *Salisbury and Co.*; *secondly*, that the plaintiff (as appears in his letter marked No. 3.), expressed himself perfectly satisfied with, and gave his consent to any arrangement that might be made by the managing partner of that concern; *thirdly*, that notwithstanding an

1820.  
  
 HOME  
 v.  
 BENTINCK.

1820.  
~  
HOME  
v.  
BENTINCK.

agreement entered into by the co-partners, viz. that no one but the managing partner should draw or indorse bills; the plaintiff's brother, *David Home*, did draw bills to a larger amount than the sum vested by the plaintiff in the said concern, which bills were accepted by the plaintiff in the name of the firm of *Salisbury and Co.* It is necessary here to observe, that the plaintiff declares his ignorance of the articles of agreement, which he affirms he never saw, and moreover, that in those articles restricting any but the managing partner from drawing or indorsing bills, the word "*accept*" does not appear. The other partners however, maintain, that it was understood by them that they were equally restricted from accepting bills. The Court think themselves further called upon to observe, that Lord *Ellenborough*, in his charge to the Jury in an action in which the present plaintiff was defendant, considered the bills drawn by *David Home*, in the same light as if drawn by his brother (the plaintiff). *Fourthly*, that the plaintiff took measures to avoid receiving personally the Lord Chancellor's injunction, restricting him from drawing, accepting, and indorsing bills on the firm of *Salisbury and Co.*; and which injunction he prevailed upon Quarter-Master *Weston* to receive in such a manner, as to induce the person sent to serve it, to believe that he had actually served it on the plaintiff; *fifthly*, and the Court think themselves bound to declare, that in the measures adopted by the plaintiff to extricate himself from the partnership, and in the steps taken by him to avoid the Lord Chancellor's injunction, as well as what subsequently took place between him and Quarter-Master *Weston*, the conduct of the plaintiff does not appear to have been actuated by those high and delicate feelings of honour, which in all transactions of life ought to influence an officer of his high rank and reputation."—Whereas, in truth, the said persons so appointed as aforesaid, at the time of the defendant's making the said representation to the Duke of York, did not, nor would, nor did they at any other time unanimously agree in the said

opinion in that count set forth :—By means whereof, the plaintiff hath been greatly injured in his good name and credit, and brought into public infamy and disgrace amongst all his neighbours, insomuch, that divers of them to whom the integrity of the plaintiff in the premises was unknown, have from thence suspected, and still do suspect the plaintiff to have been a person guilty of the offences and misconduct imputed to him by the defendant; and also by reason thereof, his Royal Highness the Prince of *Wales*, Regent of the United Kingdom, acting for and on the behalf of his Majesty, did deprive the plaintiff of his rank of Lieutenant-Colonel in the service of his Majesty; and also deprived him of his commission of Captain in the said Third Regiment of Foot Guards, and the plaintiff was thereby deprived of all the gains and profits which would have accrued to him from his pay as such officer, and hath been otherwise greatly injured. Plea—Not Guilty.

1820.  
  
 HONE  
 v.  
 BENTINCK.

At the trial of the cause before Lord Chief Justice *Abbott* at *Guildhall*, at the Sittings before the last *Michaelmas* Term, Sir *Henry Torrens* was examined on oath as a witness for the plaintiff in support of the action, and subpoenaed to produce certain minutes which were stated to contain the subject of the alleged libel, and Sir *Henry Torrens* proved upon his examination, that the plaintiff was, at the time of the transactions in question, a Lieutenant-Colonel in the army, and Captain in the Third Regiment of Foot Guards; that the defendant was a Major-General, and at the time of such transactions was Colonel in the Army; that the witness was Military Secretary to his Royal Highness the Duke of *York*, Commander in Chief of his Majesty's forces; that he, as such Military Secretary, was in possession of the minutes of a Court of Inquiry held by the direction of the Commander in Chief, of which the defendant was the president; that such Court of Inquiry consisted of several other military officers as well as the defendant, and that the inquiry was directed by the Commander in Chief to be made by such Court upon



1820.  
HOMER  
v.  
BENTINCK.

the conduct of the plaintiff; that the minutes, so in the possession of the witness, were the minutes of the proceedings, evidence, and judgment of the said Court of Inquiry, and were delivered by the defendant, as President of the said Court, personally to the Commander in Chief, as the report of the said Court upon that inquiry; that the Commander in Chief deposited these minutes in his office, and the same, by being so deposited, became and were under the care and in the custody of the witness as such Military Secretary;—The defendant's counsel hereupon insisted, that the said minutes could not be admitted and allowed to be read in evidence, but the counsel for the plaintiff contended that they ought to be admitted and allowed to be read as evidence for the plaintiff, whereupon Lord Chief Justice *Abbott* declared and delivered his opinion, that the said minutes ought not to be read in evidence; the plaintiff's counsel then tendered a copy of the said minutes as evidence for the plaintiff, delivered from the office of the Commander in Chief. Whereupon the Chief Justice declared and delivered his opinion, that such copy ought not to be read in evidence, and he directed that the Jury should find a verdict for the defendant, which they accordingly did. Whereupon the counsel for the plaintiff excepted to the opinion of the said Chief Justice, and proposed and tendered a bill of exceptions to him, containing the said several matters so offered as evidence on the part of the plaintiff as aforesaid, to which, his Lordship, at the request of the plaintiff's counsel, put his seal, pursuant to the statute in such case made and provided. Judgment having been signed for the defendant below, the plaintiff below assigned general errors, to which the defendant below added a joinder.—The case came on for argument this day, when

Mr. *Joshua Evans*, for the plaintiff in error, submitted, that the report of the defendant and the other officers, was not the report of a legal Court, or a legal commission,

and could not be protected as a confidential communication, either of private individuals or persons under government, and that even supposing it could be considered as the judgment of a Court, or report of such legal commission or communication, yet, that the plaintiff was entitled to have such report produced in evidence, and that he was further entitled to adduce testimony, (supposing it to be considered as a confidential communication), that it was false and malicious. The defendant could not have justified the libel in question, except by pleading it to be true. The only cases in which a person may write or speak to the discredit of another, and for which no action can be maintained by the party injured, are those of Judges, Jurors, witnesses, and parties in Courts of Justice. With respect to Judges and Jurors, Lord Chief Baron *Eyre*, in *Sutton v. Johnstone* (a), said, that "the cases respecting such persons could not apply, because the law gives faith and credence to what they do; and therefore, there must always in what they do, be cause for it; and there never can be any malice in what they do. The presumption of law, that Judges and Jurors do nothing causelessly and maliciously, does not derogate from the universality of the principle that where it can be shewn that one man has causelessly and maliciously accused another of a crime, or has otherwise vexed him by causelessly and maliciously exercising upon him, to his damage, powers incident to his situation of superior, the injured party is entitled to redress by this species of action."—But here, the Court of Inquiry did not constitute a legal Court. Neither was the defendant in the situation of a witness, or a party. Even if a party causes any impertinent or irrelevant matter, or tending to calumniate another, to be placed on the records of the Court, they will order it to be struck out, and animadvert on his conduct. It has been held, that counsel may justify the use of defamatory expressions, but with this

1820.

HOMER

v.

BENTINCK.

(a) 1 Term Rep. 503.

1820.  
  
 HOME  
 v.  
 BENTINCK.

restriction, that they must be well founded and pertinent; for in *Brook v. Montague* (a), it is stated, that "if a counsellor give in evidence any thing not material to the issue, which is scandalous, he ought to aver it to be true, otherwise he is punishable: for it shall be intended as spoken maliciously, and without cause." In *Rogers v. Clifton* (b) Lord *Alvanley* said, "unquestionably, a master who has given a bad character of a servant to persons inquiring after his character, is not bound to substantiate by proof what he has said, but, it is equally clear, that the servant may, if he can, prove the character to be false: and the question between the master and servant will always, in such case, be, whether what the former has spoken respecting the latter, be malicious and defamatory?" These cases shew, that although the words or writing of a defendant be defamatory of the plaintiff, the *onus* of proving malice or falsehood lies on him. Here however, the defendant was neither master nor counsel, and it is manifest how careful the law is to prevent unnecessary injury being done to the characters of individuals. In *Brown v. Croome* (c) it was held, that an advertisement in a public paper, strongly reflecting upon the character of an individual who had been declared a bankrupt, was libellous, although published with the avowed intention of convening a meeting of the creditors, for the purpose of consulting upon the measures proper to be adopted for their own security, if the legal object might have been attained by means less injurious. In *Herver v. Dowson* (d) it was decided that a person, *bonâ fide* advising his friend not to trust a third person, is not liable to an action; and in *M'Dougall v. Clamage* (e), Lord *Ellenborough* held, that a letter written confidentially to persons who employed *A.* as their solicitor,

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(a) *Cro. Jac.* 91. — (b) 3 *Bos. & Pul.* 591. — (c) 2 *Stark. Ni. Pri. Cas.* 297. — (d) *Bull. Ni. Pri.* 8. S. P, *Vanspike v. Cleyson*, *Cro. Eliz.* 541. — (e) 1 *Camp.* 267.

conveying charges injurious to his professional character, in the management of certain concerns which they had entrusted to him, and in which *B.* the writer of the letter, was likewise interested, could not be considered a libel, and made the subject of an action for damages; and his Lordship there referred to a case of *Cleaver v. Sarraude* (a), where it appeared that a letter had been written confidentially to the Bishop of *Durham*, who employed the plaintiff as steward to his estates, to inform him of certain supposed mal-practices on the part of the plaintiff, on which the Judge declared, that the action was not maintainable, as the defendant had been acting *bonâ fide*. In *Dunman v. Bigg* (b) it was held, that if *A.* is surety for *B.* to *C.*;—*A.* if acting *bonâ fide*, is justified in stating to *C.* in an unreserved manner, his opinion of *B.*'s conduct and character, whatever the charges may be which he thus imputes to him; and Lord *Ellenborough* there observed, that "such persons could not lawfully, under colour and pretence of a confidential communication, destroy the plaintiff's character and injure his credit, but it must have the most dangerous effects, if the communications of business are to be beset with actions of slander." In *Barbaud v. Hookham* (c) it was held, that words spoken to a committee of persons, to whom the management of a volunteer corps was entrusted, respecting a member, as matter of fair representation relative to his principles, are not actionable. All these latter cases, however, relate strictly to confidential communications *bonâ fide* made, but even in those cases it is necessary that the person making the inquiry should be directly interested in its object, and that the individual communicating should confine his communication to such person alone. But if a number of individuals can form themselves into an inquisition on the character of a fellow-subject, it will put an end to the repose and security of mankind.

1820.  
  
 HOME  
 v.  
 BENTINCK.

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(a) 1 Camp. 268.——(b) *Id.* 269, n.——(c) 5 Esp. 109.

1820.  
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 HOME
 v.
 BERTINCK.

Where a confidential communication has been made as to the solvency of a trader, or the skill or honesty of an attorney or steward, the person communicating has never been allowed to defame the character of the party, by stating matter totally irrelevant or extraneous. In *Godson v. Home* (a), the question was left to the Jury whether the communication was confidential or not; and Mr. Justice *Richardson* said (b), "if a man giving advice calls another thief, it is not necessary to leave it to the Jury whether such language is a confidential communication." The libel in question has not even a shadow of a confidential communication. It was written by no person immediately interested in the object of the inquiry, and though addressed and sent to the Commander in Chief, it contained no complaint whatever of the plaintiff's military conduct, or of his misconducting himself with respect to the defendant. It is not the result of the defendant's own knowledge, but of a public examination of persons in the presence of numerous spectators. It is not a statement of facts, but a direct censure on the conduct and character of the plaintiff. "If a felony be committed, it is a good cause to arrest one for felony, but not to speak words to defame one."—*Scarlett v. Stile* (c). If a master suspects a servant of a criminal act, and he were to call on third persons to calumniate him, such master would be liable to an action. So, if he were to publish a libel on such servant, although he had derived his information from persons who had attended the summons of the servant before the Magistrate. If the defendant in *Barbaud v. Hookham* (d), instead of acting on his own knowledge, had inquired from different persons what they knew to the disadvantage of the plaintiff; and in consequence of defamatory representations made by such persons, had made the report to the Committee, can there be any doubt

(a) Ante, vol. iii. p. 223. S. C. 1 *Brod. & Bing.* 7.——(b) *Id.* 8.——
 (c) 1 *Brownl. & Goldes.* 2. S. C. *Hobart*, 192.——(d) 5 *Esp.* 109.

but that such conduct would have furnished sufficient evidence of malice, and deprived him of all the protection with which his official situation clothed him? If a person, instead of secretly inquiring whether a merchant or tradesman be trust-worthy, or an attorney diligent and intelligent, were to summon third persons, and examine them as to whether the trader was insolvent, or the attorney careless and ignorant, there can be no doubt but that such conduct would be considered as malicious, but if the inquiry be extended as to the private and domestic characters and conduct of individuals, and the person making it were to publish any thing defamatory of them, it surely would not be too much to require, that he should justify such slander by averring the truth of it on the record. The only legal mode of inquiry into offences committed by individuals, is in his Majesty's Courts of Justice, where the character of the party may be inquired into. But if one individual authorize another to make inquiries as to the character and conduct of a third person, such inquiry should be confined to the person making it, for if a number be deputed to do so, there is an end of the confidence and secrecy always required when the characters of individuals are in question. It would, in point of fact, amount to the creation of a Court of Justice of a specious judicature, which is not only illegal but not to be endured. The libel in question, therefore, cannot be considered as a confidential communication made by individuals, for it was the production not of one person deputed to make inquiries, but of several, and such inquiries were not made secretly and confidentially, but by those individuals, assuming to themselves the jurisdiction and powers of a Court of Justice, and examining any witnesses who might think proper to traduce the character of the plaintiff. This alone, therefore, is sufficient to shew that it was not a confidential communication. Unless the assemblage of military officers can be supported as a legal Court, or legal commission, they can only be considered as individuals. The

1820.

HOME
&
BENTINCK.

1820.

 Home
 v.
 BENTINCK.

defendant therefore, as their President, should have pleaded the truth of the libel as a justification of its publication. He was not justified in making the report in question, in consequence of any authority he might have received from the Commander in Chief. High as the latter stands in rank and situation, he is merely to be considered as a subject, and cannot claim any privileges by virtue of the office he holds, to which the meanest subject if appointed to it, would not be entitled. If the Commander in Chief is empowered to direct such an inquiry as the present, the Lord Chancellor, the Lords of the Admiralty, and all other persons having authority under government, would be equally entitled to the same prerogative. It is unnecessary to cite authorities to prove, that no subject of this realm can appoint a commission, or erect a Court, without authority either from the Sovereign or the legislature. If therefore, the defendant and the other officers had any such authority to sit as a Court of Justice, it was incumbent on him to have shewn it, but he could not do so. Even assuming, that the defendant and other officers were authorized by his Majesty (although such was not the case), to inquire and give an opinion on the plaintiff's character and conduct, still, the Sovereign himself could not legally erect such a tribunal. If this authority was derived from that high source, they must have constituted either a Court or a Commission, there is no other expression that can be used for the purpose of describing them. In *Symes's Military Dictionary* (a), it is stated, that "a Court of Inquiry is of a very delicate nature; a number of officers are assembled to inquire into an officer's *supposed* misbehaviour, and I have known them ordered to give their opinions in writing to the person who ordered them to assemble, that he may judge from their determination if there is sufficient matter to bring him to a General Court Martial. There is no article of war for this kind of

(a) See also the *Elements of Military Arrangement*, tit. *Court of Inquiry*.

proceeding, and though it has frequently been complained of, because the members are not sworn, and that its opinions may influence a General Court Martial, by prejudging the cause, yet reason has hitherto been unsuccessful in its endeavours to abolish this unequitable custom of the army.—[Lord Chief Justice *Dallas*.—The Court cannot consider that as a book of legal authority.]—A Court of Inquiry is illegal on this ground, viz. that the witnesses do not give their evidence on oath, nor is there any power in the members constituting it, to make such witnesses attend to give their testimony. In *Comyns's Digest* (a), it is thus laid down, “The King, by his prerogative, may make what courts for the administration of the common law, and in what places he pleases; but the King cannot erect a Court of Chancery, or Conscience, nor grant to a Court that it may proceed according to the civil law, nor can he by charter or commission alter the common law. So, the erection of a new Court, with a new jurisdiction, cannot be without act of Parliament.” These authorities are decisive to shew that the Sovereign himself could not erect such a Court as a Court of Inquiry, which, in point of fact, has no resemblance to a Court of justice, except the name. The members who preside as judges are not sworn, the witnesses are not examined on oath, and no judgment can be given. Even if it were a commission to inquire:—In the case of commissions of inquiry (b), it is said, “Note, commissions in English under the Great Seal were directed to divers commissioners, within the counties of *Bedford, Bucks, Huntingdon, &c.* to inquire of divers articles annexed to it, and the articles were also in English, to inquire of depopulation of houses, &c. but the commissioners should not have any power to hear and determine the said offences, but only to inquire of them; and by colour of the said commissions, the said commis-

1820.

HOME
v.
BENTINCK.

(a) *Tit. Prerogative, D. 28.*—(b) *12 Rep. 31.*

1830.
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 Home  
 v.  
 Bastings.

sioners took many presentments in English, and did return them into Chancery, and afterwards it was resolved by nine Judges, that the said commissions were against law, for these, among other reasons, viz. for that it was only to inquire, which is against law, for by this a man may be unjustly accused by perjury, and he shall not have any remedy;—that a party may also be defamed, and shall not have any traverse to it. Such a commission may be only to inquire of treason, felony committed, &c. and no such commission ever was seen to inquire only, (that is to say, of crimes).” That case shews conclusively, that by the common law, a commission to inquire, without a power to determine, was always illegal; but the illegality of such commissions does not rest merely on that decision. The same doctrine is laid down in the Second and Fourth *Institutes* (a), *Hale’s Pleas of the Crown* (b), and in *Rolle’s Abridgment* (c) the following passage is to be found, for which *Rot. Parl.* (d) is quoted in its support: “It is prayed, that divers commissions of inquiry by the Chancellor, Treasurer, and other great officers be repealed, for that it is not lawful to grant them without assent of Parliament.” By the statutes 43 *Edw. 3.* (e), and 16 *Car. 1.* (f), it was enacted, that “no man be put to answer without presentment before Justices, or matter of record, or by due process and writ original, according to the old law of the land; and if any thing be done thenceforth to the contrary, it shall be void in law, and holden for error.” By 1 *Will. & Mary* (g), it was declared, that “the commission for erecting the late Court of commissioners for ecclesiastical causes, and all other commissions and Courts of like nature, were illegal and pernicious.” These statutes shew, that even the King himself has no jurisdiction to erect a Court of military inquiry. As a standing army is

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(a) 2 *Inst.* 478. 4 *Inst.* 163.—(b) Vol. ii. page 21. s. 5.—(c) 2. 164. pl. 14.—(d) 15 *Edw. 3.*—(e) Cap. 3.—(f) Cap. 10.—(g) *Scss. 2* c. 2. s. 1.

1620.

HOMER

v.

BENTLEY.

merely the creature of the Mutiny Act, there can be no immemorial custom belonging to the army; but supposing that Courts of inquiry had custom to support them, yet such custom would be illegal, as contrary to the authorities. In *Tredymmock v. Perryman* (a), a custom in an inferior Court to try issues by six Jurors, was held illegal, though such custom had existed beyond the time of legal memory, and many judgments had been given on verdicts so found;—and it appears that this judgment was affirmed in the House of Lords (b). In *Money v. Leach* (c), it was held, that even antiquity itself could not sanctify a usage which was fundamentally bad. Therefore, unless the Mutiny Act makes a distinction as to the military, the meeting in question was clearly illegal, although it was authorised by the Sovereign himself. But if there be any class of his Majesty's subjects that are by law particularly protected from such an inquisition, it would appear to be the army. The preamble to the Mutiny Act (d) states, "And whereas no man can be forejudged of life or limb, or subjected in time of peace to any kind of punishment within this realm, by martial law, or in any other manner than by the judgment of his peers, and according to the known and established laws of this realm;—yet nevertheless, it being requisite for the retaining of all the before mentioned forces in their duty, that an exact discipline be observed, and that soldiers who shall mutiny or stir up sedition, or shall desert his Majesty's service, be brought to a more exemplary and speedy punishment than the usual forms of the law will allow:—"The act then proceeds to designate the punishment for several offences, and afterwards authorises his Majesty to grant commissions for holding Courts martial (e), enacts how those Courts are to be formed (f), and directs that officers on Courts martial, and witnesses, shall be

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(a) Cro. Car. 259. ————— (b) See 1 Roll's Abr. 564, pl. 17. —————

(c) 1 Sir W. Bl. 562. ————— (d) 55 Geo. 3. c. 108, continued by 1 Geo. 4. c. 19. ————— (e) 8<sup>th</sup>. 14. ————— (f) 8<sup>th</sup>. 20.

1820.  
 ~~~~~  
 HOME
 v.
 BENTINCK.

sworn (a). It is further enacted (b), that it may be lawful for his Majesty to form, make and establish, articles of war, for the better government of his Majesty's forces, which articles shall be judicially taken notice of by all Judges, and in all Courts whatsoever. It is also provided (c), that for bringing offenders against such articles of war to justice, it shall be lawful for his Majesty to erect and constitute Courts martial.—By the articles of war, 30.(d), "Whatsoever commissioned officer shall be convicted before a general court martial, of behaving in a scandalous, infamous manner, such as is unbecoming the character of an officer and a gentleman, shall be discharged from our service; provided, however, that in every charge preferred against an officer for such scandalous and unbecoming behaviour, the fact or facts whereon the same is grounded shall be clearly specified." And by article 2. (e), "all crimes not capital, and all disorders and neglects which officers and soldiers may be guilty of, to the prejudices of good order and military discipline, though not specified in the said rules and articles, are to be taken cognizance of by a general or regimental Court martial, according to the nature and degree of the offence, and to be punished at their discretion."—The Mutiny Act, therefore, is an authority for every position that can be urged in favour of the plaintiff, as the preamble acknowledges that no person can be legally tried except by his peers, and according to the common law of the land;—it allows that military persons would be in the same situation as others, but for its enactments, and points out the necessity of varying from the common law, in respect of trials of military men; but it does not enact that they may be tried by persons not sworn, or that witnesses shall not be examined on oath, or that the persons accused shall not have the power of summoning witnesses—but its

(a) S^c. 28. 29.—(b) S^c. 35.—(c) S^c. 37.—(d) S^c. 16.—(e) S^c. 24.

1820.

 HOME
 v.
 BENTINCK.

enactments are precisely the reverse. It certainly gives the Sovereign almost boundless power as to framing articles for the government of the army; but he cannot appoint such a tribunal as a Court of inquiry to try offenders, for the statute expressly enacts, that the trial shall be by Courts martial. On what ground, then, can it be contended, that an officer can be tried by any other than an ordinary Court of justice, or the particular Court appointed by the Mutiny Act? Mr. Justice *Powell*, in *The Seven Bishops* case, said (a), "I think there is no danger to the government at all, in requiring good proof against offenders." In *Grant v. Gould* (b), it was said, that "it was not to be disputed that martial law can only be exercised in this country, so far as it is authorised by the Mutiny Act, and the articles of war." In *Sutton v. Johnstone* (c), Lord Chief Justice *Mansfield*, and Lord Chief Justice *Loughborough*, stated, that "if a man be charged with an offence against the articles of war, or where the articles are silent against the usage of the navy, his guilt or innocence can only be tried by a Court martial." Although the Sovereign may be empowered to dismiss an officer, without assigning or having any reason, yet, he cannot appoint or constitute such a Court of inquiry as the present. It may be said, that no punishment has been inflicted on the plaintiff by the proceedings in this Court;—but he has been thereby deprived of his commission, and cast on the world without even the bare means of obtaining subsistence, or the power of acquiring it—whereas, the severest punishment allowed by the articles of war, and the Mutiny Act, is cashiering, except in two or three instances, where the offender has forfeited his life for an egregious crime, of which he was found guilty. A Sovereign cannot dismiss an officer without a cause. Power and right are distinct terms. In *Comyns's*

(a) 4 *Hargrave's State Trials*, 341.—(b) 2 *H. Bl.* 95.—(c) 1 *Term Rep.* 549.

1830.
 ~~~~~  
 HONE  
 v.  
 BENTINCK.

*Digest* (a), it is laid down, that "the King's prerogative cannot be exercised but for the benefit of the subject." But what can be more unjust or injurious to the nation, than to dismiss an officer from the army or navy, and what cause can be sufficient to justify such a dismissal, which could not be tried by a Court martial? In *Oliver v. Lord William Bentinck* (b), Sir James Mansfield said, "The libel is in fact a recital of the effect of the authority under which the defendant acts; and it would be a monstrous thing if the Court of Directors were to dismiss an officer without assigning a reason." It may be said, that this is an action *prime impressionis*; but it is the first case in which proceedings in a Court of inquiry have occurred to afford an opportunity of bringing such an action. By all the military writers, such a Court is assimilated to a Grand Jury, and it is at the utmost its duty to find whether there were grounds for a Court martial, or not. But here, the defendant and other officers, have passed a judgment of condemnation. The charges contained in the libel, do not at all reflect on the plaintiff's military character, and are in direct contradiction to the evidence given before the Court of inquiry. It could not be justified as the act of individuals, unless by averring the truth of the slander, and proving it—and at all events, the plaintiff ought to have been allowed to prove the falsehood and malice of the charges. As, therefore, this Court could not be appointed by any subject, however high his rank, and as the Sovereign himself could not constitute such a Court or commission, and consequently that no person acting under it could derive any protection from it, still further, any person advising his Majesty to constitute such a tribunal, would be guilty of a highly aggravated misdemeanor, and the persons acting under it, although not guilty to the same extent, are yet extremely culpable for lending themselves to such an illegal

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(a) Tit. *Prerogative*, D. 28.——(b) 3 Taunt. 459.

act.—This position being established, it is quite clear that the Chief Justice of the King's Bench was not justified in refusing the minutes of the Court of Inquiry to be read at the trial; for if the appointment of the Court was illegal, the report is like any other libel written by individuals, and the party in whose possession it is, is bound to produce it.—Even supposing the argument to be erroneous, and that the Court of Inquiry was a legal Court or commission, or the report a legal confidential communication, still, it would be impossible to support the learned Judge's refusal of it in evidence. If the resolutions can be considered a private confidential communication, it is impossible to state a single instance in which the paper containing such communication has been refused to be received in evidence; for if a communication be false and malicious, the covering it with the semblance of being confidential will not protect the writer from an action. If the Court can be considered as a legal Court or commission, there can be no doubt but that the original proceedings, or a copy, should have been admitted in evidence. The only exception is that of an indictment for felony, where the party accused is acquitted. In the case of misdemeanors, a party is entitled to a copy as a matter of right, and although, in a case of felony, it is ordered that no copy be given without a Judge's or the Attorney-General's order, yet if a copy, or the original be produced, it must be admitted in evidence. That point was determined in *Legatt v. Tollevay (a)*, where a copy of an indictment was produced without authority, and it was argued, that it could not be given in evidence, without an order; and the Court said, it was not for them to inquire how it came there, but that they were bound to admit it. In the cases of Courts Martial, the Mutiny Act provides, that a copy of the proceedings shall be furnished. But can it be said, that the report in ques-

1820.  
  
 HOME  
 v.  
 BENTINCK.

---

(a) 14 East, 302.

1820.

HOME

v.

BENTINCK.

tion, as being a confidential communication to one of his Majesty's superior officers, respecting another officer of his Majesty, was thereby privileged? One man cannot cause inquiries to be made into the character of another, and afterwards publish the result of such inquiries. Much less can it be contended, that an individual may write a false and malicious libel of an officer in his Majesty's service, and that such officer can have no redress. It can make no difference that he was directed to make inquiries by a superior officer: if that officer was a party to the falsehood and malice, it would make it a conspiracy, and if he was not, the writer would not be less guilty. At the trial of this cause at *Nisi Prius*, the Attorney-General stated, that the objection made by him on the part of the defendant, as to the inadmissibility of the report in evidence, was not new; and he referred to the case of *Cooke v. Maxwell* (a), which was an action brought against the defendant, as Governor of *Sierra Leone*, in which it appeared, that he had given particular orders to one of his officers, which orders were called for by the plaintiff; but it was decided, that they were a privileged communication to that officer, and as being such privileged communication, they could not be produced (b). In the printed report

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(a) 2 Stark. Ni. Pri. Cas. 183.

(b) The Attorney-General cited this case from the short-hand writer's notes, by which it appeared, that it was an action of trespass brought against Governor *Maxwell*, for the false imprisonment of the plaintiff, for a supposed infringement of the Slave Act, and was tried before Mr. Justice Bayley, at *Guildhall*, on the 7th of July, 1817, and a witness was there called, by whom the injury complained of by the plaintiff was proved to have been inflicted, in pursuance of the orders of the defendant; and on his being called on to state what the defendant's orders were, it was inquired by Counsel, whether those orders were written or verbal? to which the witness replied, that they were in writing. He was then asked, whether they were delivered to him by the defendant, as Governor of, and commanding the colony? The witness said they were, when the production of the document containing the orders was objected to, on the ground that it was a confidential communication; and the learned Judge being of opinion, that it was of a private nature, held, that it could not be produced. In another short-hand writer's notes of the same trial, it is stated, in addition to the report in *Starkie*,

of that case, Mr. Justice *Bayley* is made to say (a), "The law will not work injustice, and if the document cannot, on principles of public policy, be read in evidence, the effect will be the same as if it was not in existence, and you may prove, not the contents of the instrument, but that what was done, was done by the order of the defendant." It therefore appears, that the report of *Cooke v. Maxwell*, as cited by the Attorney-General, was inaccurate, as Mr. Justice *Bayley* did not decide that the evidence was inadmissible; but it is evident, that if no other evidence could have been procured, he would have compelled the production of it. That, therefore, is a strong case for the plaintiff, and expressly in point, to shew, that if any imperious rule of law prevented the production of the original, the plaintiff was entitled to give secondary evidence. In the case of *The Seven Bishops* (b), the clerk of the Privy Council was compelled to state what passed in the Council Chamber, nay, what was said by the King himself, although the counsel for the Crown most strenuously resisted it. The same evidence was also allowed to be given in *Lord Strafford's* case (c). In *Lee v. Birrell* (d), it was decided, that notwithstanding the oath administered to the collector of the property tax by the Commissioners, that he would not disclose any thing he hears in that capacity, except by their consent; or by virtue of an act of Parliament, still, that he was bound, when subpoenaed as a witness, to give evidence of all facts within his knowledge touching the matter in question. In *Robinson v. May* (e), which was an action for a libel contained in an anonymous letter, written by the defendant to

1820.  
  
*Horne*  
 v.  
*Bentley*.

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that Mr. Justice *Bayley* said, "Indeed I do not know, that that which was issued by Governor *Maxwell*, was at all within the scope of any authority which he had derived from, and in virtue of his situation as Governor."

(a) 2 *Stark. Ni. Pri. Cas.* 186. — (b) 4 *State Trials*, 342. —  
 (c) 1 *State Trials*, 727. — (d) 3 *Cump.* 337. — (e) 2 *Smith's Rep.* 3.



1820.  
 ~~~~~  
 HOME
 v.
 BENTINCK.

one of the Commissioners of the Lords of the Admiralty, imputing misconduct to the plaintiff, in granting protection to mates of vessels, without being empowered so to do ; and it was discovered that the charge was false, and the letter was given up by the Lords of the Admiralty, and an action was brought against the defendant for the libel, who called no witnesses at the trial, but insisted that the plaintiff had not proved a malicious publication, since it was only confidential, being sent to the proper officer, to whom information ought directly to be communicated, and there was no further proof of any malicious intent, or further publication ; and the case was left to the Jury, who found the defendant guilty :—On a motion for a new trial, on the ground that the publication was not proved to have been malicious, Lord *Ellenborough* said, that “ although it might be considered the duty of every person to communicate to his Majesty’s servants every circumstance that might be prejudicial to his Majesty’s service, still, that as to the question of malicious publication, it rested entirely with the Jury, and that the absence of all ground for the representation, was sufficient proof of malice, where no excuse was offered in evidence on the part of the defendant.” That case is undistinguishable from the present. The libel there might be considered as a confidential communication to the Board of Admiralty, and the same objection was taken as here, viz. that it was confidential—but it was over-ruled, and on the production of it in evidence, it was held, that the question must be determined by the Jury, whether the publication were malicious, or not ? However a party may obtain possession of such a document, or of an authentic copy of it, can make no difference ; it must be received in evidence. That was decided in the cases of the *Attorney-General v. Le Merchant* (a), and *The King v. Archer* (b). Here, it was insisted at the trial, that it was

(a) 2 Term Rep. 201, n. — (b) *Id.* 203, n.

necessary for the interest of the army and the public, that inquiries of this description should be made, and that it would be against the public interest to allow the production of the report. Necessity is always a most suspicious argument, and never wanting to support the worst of measures. It is evident that Courts of Inquiry are not sanctioned or allowed by law. But even supposing that necessity could make such courts lawful, what is the necessity? By a Court Martial, every offence, however minute, may be inquired into; and it cannot be contended for a moment that martial law is too mild, and gives too little power to the Sovereign. Mr. Justice *Blackstone* (a) observes, that "the discretionary power of a Court Martial is indeed to be guided by the directions of the Crown, which, with regard to military offences, has almost an absolute legislative power. "His Majesty," says the Mutiny Act, "may form articles of war, and constitute Courts Martial, with power to try any crime by such articles, and inflict penalties, by sentence or judgment of the same"—a vast and most important trust! an unlimited power to create crimes, and annex to them any punishments not extending to life or limb! These are indeed forbidden to be inflicted, except for crimes declared to be so punishable by this act, among which, we may observe, that any disobedience to lawful commands is one. Perhaps, in some future revision of this act, which is in many respects hastily penned, it may be thought worthy the wisdom of Parliament to ascertain the limits of military subjection, and to enact express articles of war for the government of the army, as is done for the government of the navy." By the publication of the report in question, the character and reputation of the plaintiff has been completely destroyed. Can it be said that this is no injury or punishment? "*Eadem fama quæ vitæ est habenda ratio fama vitæque hominis iisdem legibus*

1820.
 ~~~~~  
 HONE  
 v.  
 BERTINCK.

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(a) 1 Bl. Com. 416.

1820.  
 ~~~~~  
 HOMS
 v.
 BENTINCK.

ligantur." For what purpose can this mode of power be so eagerly sought after? If any other person than a military man commit an offence, his Majesty's Courts are open for the investigation, and if guilty, will punish the offender. But if an officer in the army commit an offence, a Court Martial is provided in addition. Courts of Inquiry, therefore, can only be so anxiously defended, for the purpose of destroying the innocent and protecting the guilty. It has been observed by a military writer (a), that "the paradox of a guilty man without fault is not more inadmissible in law, than irreconcilable with experience; military law recognizing even all disorders and neglects which officers and soldiers may be guilty of, though not specified in the articles of war." The Sovereign himself cannot cause an officer to be dismissed the service without just reason;—if he could, he would be equally empowered to take his life. But the principle on which the plaintiff here rests is, that the report in question cannot be considered as a confidential communication made by individuals; that even if it could be so deemed, the plaintiff ought to have been allowed to give evidence to prove that it was false and malicious. It has been shewn, that the only distinction between officers of the army and other individuals is caused by the Mutiny Act; that, by that act, Courts Martial are appointed for the trial of military men; that the Sovereign himself cannot create such a Court as a Court of Inquiry; that supposing it to be a commission of inquiry, it is illegal both by the common and statute law; that if it be illegally constituted, its proceedings ought to have been admitted in evidence when produced—or that, even if it were a Court or Commission, the plaintiff was entitled to have the minutes read in evidence; and that the Sovereign is vested with sufficient power for the government of the army—but, if that be not the case, it is the province of the Legislature, and not of the Court.

(a) *Williams's Military Law*, page 148.

Mr. *Littledale*, for the defendant in error. Two questions have been raised, namely, whether the defendant ought to have pleaded a justification, or whether the present action be maintainable. But both these are quite foreign to the record, as the only point for the consideration of the Court now is, whether certain documents which were offered in evidence at the trial of this cause were admissible or not. It appeared that the Military Secretary to the Commander in Chief, was in possession of the minutes of a Court of Inquiry, held under the direction of such Commander, and that the defendant was the President of that Court. That the minutes in question formed the report of the proceedings there, and were delivered by the defendant to the Commander in Chief in consequence of the directions he had previously given for the holding the Court. Such minutes, therefore, were in the nature of a confidential communication, and ought not, for the safety and security of the state to have been received or read in evidence, without the direction or sanction of his Majesty. By the common law, the King has, by his prerogative, the command of the army, although his powers are restrained by the Mutiny Act, which recites, "that a standing army in time of peace, unless it be with the consent of Parliament, is against law." Still, where there is an army in time of war or peace, the King is the supreme commander of it by the common law, and having such command vested in him, although he has not the absolute control over the lives and limbs of the persons who compose it, and though he may be restrained as to the mode in which he shall exercise his government over the army; yet, where the Mutiny Act is silent, and the proceedings appear necessary for the due discipline of the army, the King has a right to direct whatever he may think proper; and his having such command, is no more than the exercise of other prerogatives in matters of state. In all matters relating to affairs abroad, or regulations at home, the execution of power is vested in the King, which he exercises in the army, through the medium of the Com-

1820.

HOMER

v.

BENTINCK.

1820.
 ~~~~~  
 Home  
 v.  
 BENTINCK.

mander in Chief. With respect to our foreign relations, the Secretaries of State must have many communications made to them, which it would be not only improper, but highly dangerous to disclose. So, at home, the officers of the Crown must be under the necessity of giving directions, and receiving communications, which would be injurious to the public if they were made the subject of public discussion. The same observations are applicable to the army and navy, and it would not only be impolitic, but unwise, that the conduct of military officers should be publicly known, and blazoned forth to the world. It is wholly unnecessary to point out the several inconveniencies that might arise, if all the reports made to government were made the subject of discussion and observation in all the public prints of this country. It is the policy of the law, therefore, that all these communications should be kept secret. Although the King is restrained in a certain degree by the Mutiny Act, from exercising that full control which a despotic commander would have in a foreign country, still he has the direction of issuing such orders as he pleases for the better discipline and regulation of the army, provided they are not contrary to that act, or the common law. He has a right to inquire into, and controul all licentiousness in the conduct of officers, as well in the army as elsewhere, for their commissions are all held at the pleasure of the Crown. Although, therefore, in many cases, for the punishment of offences alleged against the discipline of the army, the Mutiny Act has provided Courts Martial to be held, yet the King, by his prerogative, has a right of appointing what is termed a Court of Inquiry. These Courts have been held as long as memory can furnish, but the earliest instance which can be found as recorded, is that which was directed on the expedition to *Quiberon Bay*, in 1756, where the Crown, in the following year, directed an inquiry into the reason of the failure of that expedition (a).

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(a) See *Sir John Mordaunt's case*, *M<sup>r</sup> Arthur on Courts Martial*, 4th edit. vol. i. page 112.

The warrant there stated, that the expedition had been ordered to *France*, and had turned back without landing.—It was the constant and invariable practice in the course of the last war, to hold Courts of Inquiry. After the landing of our troops in *Portugal*, and after the battle of *Vimeira*, and in several other instances there were inquiries held, and no Courts Martial. How is the prerogative of the Crown to be known without its being exercised and practised? The object of Courts of this description is not to punish the parties, but to direct certain officers who are named in the commission, to make inquiry as to particular circumstances, and on the report of the proceedings of such inquiry being laid before his Majesty, he directs through the medium of the Commander in Chief, whether he thinks it right to order a Court Martial or not. The Court of Inquiry therefore resembles a Grand Jury. An individual is not put to answer criminally, unless there be a bill previously found, or an information filed in the King's Bench by the Attorney-General, or in particular instances, *viz.* as in the cases of highways, where a presentment is made by a Magistrate; therefore, the leading and general principle is, that no man shall be put on his trial without previous inquiry being issued to put his conduct in a due course of investigation. That is the particular province of a Court of Inquiry. If, then, it be a prerogative of the Crown to issue a commission to hold such a Court, the communications made to the Crown ought to be protected and kept secret by analogy to the proceedings of a Grand Jury. They are sworn to secrecy, but it does not appear that the members constituting a Court of Inquiry are, but still, the two bodies so far resemble each other, that if the proceedings before the one cannot become the subject of discussion, the other ought to be kept equally secret. But the broader ground on which the proceedings of a Court of Inquiry should be protected from public discussion is, that they are in the nature of all communications which are required by

1820.  
  
 HOME  
 v.  
 BENTINCK.

1820.  
  
 HOME  
 v.  
 BENTINCK.

the Crown from its officers as to any matters which concern the State in any way whatever. If the Crown were to direct the Secretary of State for Foreign Affairs, to send to inquire into the state of a garrison abroad, and the commanding officer were to make a report in consequence, which reflected on the conduct of some of the officers, would there be any pretence for saying, that if one of such officers felt aggrieved by it, and no further steps were taken upon it, he could compel the production of that report, and the proceedings that took place under it? Such report might not only relate to the conduct of that officer, but to a great many other circumstances, which it would be most injurious to the public service to disclose:—it might relate to improper conduct in the garrison on the part of several persons, or to communications which they were making with an enemy, or it might possibly contain a communication from the enemy, which it would be highly advantageous to act on. Can it therefore be contended, that the whole of the report must be received in evidence if one officer felt himself aggrieved? So, if the Lords of the Admiralty were to direct an inquiry to be made as to the state of a ship, if the officers were aggrieved, could the whole of the report be read?—Whether one or several individuals feel aggrieved, the consequence is the same, as an application must be made to the Crown, who would direct the proper redress according to the nature of the case. If a report contains matter as to the conduct of an officer, which it would be improper to disclose, is there any ground to say that it must be received in evidence without the authority or sanction of the King? If the plaintiff's conduct had been the subject of inquiry not by the Crown, but by the House of Lords, or Commons, and a report had been made by the Committee, and the clerk was subpoenaed to produce it in evidence, any person who insisted on such production would be committed by the House for a contempt. So, in those matters which relate to the prerogatives of the Crown, the officers are no more coun-

pellable to produce the reports made, in consequence of the direction of the Crown, and be allowed to give them in evidence without the consent of the King, than a person would on a report of either of the Houses of Parliament, without a direct order from one or the other of such Houses. As to the cases cited for the plaintiff, to shew that a Court of Inquiry is neither legal nor allowable, and that the King has even no right to create such a Court; they are wholly inapplicable to the present question, as they are cases where the general body of the public might be prejudiced. But this is the trial of an individual—an officer in the army, and who must submit to its regulations. It is not like a commission to different parts of the country to make inquiry, and in consequence thereof to impose pains and penalties on any subject; but the Crown has an absolute right to inquire, and make regulations as to the discipline of the army, and the plaintiff, by accepting a commission, put himself voluntarily under the prerogative of the Crown, and therefore he cannot say if the Crown has been in the habit of directing these Courts of Inquiry, that they are illegal. But the moment he entered the army, it was his duty to submit to all the regulations respecting it. Independently of a Court of Inquiry being a proper Court, which the Crown may create, a communication like the present, is, at all events, protected, as the King; for the maintenance of the discipline of the army, would have a right to direct such an inquiry to be made, without calling it a Court. In other departments below the Crown, where the conduct of particular individuals is submitted to a superior, the head of the department would have a right to inquire into the conduct of the parties under him. The Archbishop of a province, or the Bishop of a diocese, who had a complaint against a clergyman, would have a right to direct the clergy of such diocese to hear the complaint, and make a report to him as to the conduct of that clergyman, with a view to punish him. Such report would be a confidential communication which the clergy would be

1820.

  
 HOME  
 v.

BENTINCK.



1820.  
~  
HOMER  
v.  
BENTINCK.

bound to make, and even if they were not, still, it being a confidential inquiry, instituted by the direction of the superior of that class of society, although the party felt aggrieved by it, he could not compel its disclosure, because it was a communication made compulsorily, it having been directed by the head of that department.

In all cases, and more particularly those, where the person who institutes the inquiry, is vested with an authority, and accordingly directs such inquiry to be made, it must be considered as a private and confidential communication, and not to be permitted to be given in evidence. *A fortiori*, therefore, the Crown has a right to direct inquiries to be made into the conduct of individuals under it, and a report made in consequence of such direction cannot be made public. There are not many cases on this subject, as the principle has never before been disputed. Those that have been cited to shew that the present action is maintainable, are beside the present question, which is confined, simply, to whether the report is in the nature of a communication that ought to have been received in evidence at the trial. *Robinson v. May*, was decided on a totally different ground. The form of the action was not the same as the present, and it was a voluntary communication made by a person who thought it his duty to make it to the Lords of the Admiralty; he was not even desired, much less commanded to make it, but here a command issued from the Sovereign himself, directing certain officers to hold a Court of Inquiry, and therefore a report of the proceedings of that Court is not like a voluntary communication from an individual. In *Atherfold v. Beard (a)*, it was held, that a wager respecting the amount of any branch of the public revenue was illegal, and the question there was, as to the amount of the duties on hops, and the fact was not al-

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(a) 2 Term Rep. 610.

lowed to be proved, on the ground that the officers were not bound to produce the revenue books. In *Wyatt v. Gore* (a), which was an action for a libel, the Attorney-General of the province was called as a witness, and asked as to the nature of some communications made to him by the defendant, (the Governor of the Colony), relative to the plaintiff's conduct, when it was objected for the defendant that such evidence could not be admitted, as it was a confidential communication, and Lord Chief Justice *Gibbs* held, that "the witness was not bound to answer such questions, and that whether the communications were of a public or private nature, they ought not to be disclosed." But the present case is much stronger than that, because there it did not appear that the communication arose on a proceeding by the order of the governor, to institute an inquiry; it was merely some communication with the Attorney-General, or conversation as to the conduct of the plaintiff. If that communication was deemed to be privileged, *à fortiori*, the report in question ought to be so considered, as it was made in consequence of a direction from the Commander in Chief to persons who were not competent to disobey it. In *Cooke v. Maxwell* (b) Mr. Justice *Bayley* thought that evidence of orders given by the Governor of a Colony to a military officer was not admissible, but he allowed the cause to proceed, because there was other evidence to shew, that what was done, was done by the order of the Governor. In *Anderson v. Hamilton* (c), Lord

1820.  
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 HOME
 v.
 BENTINCK.

(a) *Holt's Ni. Pri. Cas.* 299.——(b) 2 *Stark. Ni. Pri. Cas.* 183.

(c) This was an action of trespass for false imprisonment, and was tried before Lord *Ellenborough*, at *Westminster*, on the 23rd of *February*, 1816, when the counsel for the plaintiff wished to put some questions to the Earl of *Liverpool*, as to certain letters he had received from the plaintiff; and on his examination he stated, that in the year 1810 he was Secretary of State for the Colonial Department. He was then asked, whether, in the month of *November* in that year, he received a letter from the plaintiff, to which he answered, that he did not recollect the contents of the letter, but that he received a complaint from the plaintiff, then resident at *Heligoland*, against the defendant, as governor of that

1820.
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 HONN  
 v.  
 BENTINCK.

*Ellenborough* seemed to treat all official communications made by, or to officers of his Majesty's government, as being of such a nature that they ought not to be disclosed.

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place; when it was objected for the latter, that the letter could not be given in evidence, on which Lord *Ellenborough* said, that "the letter should be produced in the usual way, or the next best evidence given, but that no person in an official situation could say any thing more than that he had received letters from a person of a particular name." It was then proposed to refer to certain copies of the Earl of *Liverpool's* letters which he had written to the defendant, in consequence of the plaintiff's complaint, when it was further objected for the defendant, that a correspondence between the Secretary of State, and a person acting as the representative of his Majesty's government in a foreign dependency, to which the latter was no further a party, than as being called on to communicate in the most confidential manner what had transpired in the island between the plaintiff and defendant, could not be admitted. That in a private contest by an individual against such governor, the security of the state would make it indispensably necessary that letters written under the seal of confidence should not be disclosed, and that it was not only perfectly new, but highly dangerous, if these letters were admitted. The plaintiff's counsel then observed, that "with regard to the first of the letters, the fact of its being written was merely required, in order to lay a foundation for the answer, and particularly, as such first letter of the plaintiff stood without any communication with the defendant, and Lord *Ellenborough* said, "My doubt arises on this:—If the objection had been made by the Noble Earl to the production of this correspondence, as a matter of state, I should have given the fullest effect to it. I remember upon some of the State Trials, that Lord *Grenville* was called to produce some letter which was supposed to have come to his hand, having been intercepted in the course of the post, or by some means of that nature. I speak from recollection only. I do not know whether I am correct, but, upon the objection, it was thought, that secrets of state were not to be taken out of the hands of his Majesty's confidential servants. Now I am very unwilling to have the evidence of what Lord *Liverpool* has written, by way of observation on the plaintiff's conduct, for it might be used as a condemnation of him, collateral to the facts of the case. If it was merely to prove a fact, it would be a different thing. There might be a thousand facts of the utmost consequence, respecting the state of the government, the connexion of parties, the state of politics, and the suspicion of foreign powers with whom this country may be in alliance. The fact of a complaint having been made against the defendant by the plaintiff to the Earl of *Liverpool*, cannot be got at, if embodied in an official letter, neither can an extract from such letter be admissible in evidence, for the Court must be entitled to hear the whole or none; and I therefore think that the whole of this letter is not admissible, on the ground of the objections which have been raised for the plaintiff."—MSS. from Mr. *Gurney's* notes.

In the cases of *Hardy* and *Horne Tooke* (a) several communications which had been made were considered as confidential, and incapable of being admitted in evidence. In *Phillips on Evidence* (b), all the cases on this subject are collected, which generally illustrate the position, that communications of this description ought not to be disclosed. If, therefore, the original report was not admissible in evidence in this case, *à fortiori*, the copy ought not to have been received. It is not like the proving a fact *aliunde*, the copy ought not to have been delivered without the authority of the King himself, and, it was improperly obtained, from the office of the Secretary of State. It is true, that in many cases where a person cannot produce the original, he may produce a copy, but if the objection to the production is, that the contents ought not to be disclosed from motives of state policy, a copy cannot be received for the same reason. A Court of Inquiry has been universally recognised by the military law; and even if it were not a regular Court, the King, in the exercise of his discretion, would be empowered to institute inquiries into the conduct of officers and other persons under his command. Where an individual submits to the rules of the army, it cannot be deemed inconvenient, that his Majesty should direct inquiry as to the conduct of its officers, as a guide for exercising his discretion whether he shall order them to be brought before a Court Martial or not. At all events, the report of the proceedings before the Court of Inquiry in the present instance, is a privileged and confidential communication, the contents of which ought not to be disclosed.

Mr. *Evans*, in reply.—It has been contended that the King has a right to order an inquiry to be made into the character of any individual connected with the government, and that he has an absolute and imperative power over the army, unless in certain cases, where he is restrained by the pro-

1820.  
  
 HOME  
 v.  
 BENTINCK.

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(a) *Howell's State Trials*, vol. xxiv. p. 753.—(b) Vol. i. 5th edit. 484.

1820.  
 ~~~~~  
 HOME
 v.
 BENTINCK.

visions of the Mutiny Act. Such a doctrine is wholly destructive of the liberty of the subject, as an officer may be deprived of his commission and situation, be his rank high or low, at the mere pleasure of the Crown. The King, however, has no power over the army but by that statute, it contains no terms of restraint, quite the reverse. But still, he is not empowered to appoint a Court or Commission of this description, for the mere purpose of inquiring into the character and conduct of one of his subjects. With respect to the cases cited, as to the report in question being in the nature of a confidential communication;—in all those instances, documents have been first produced, and the Judge and Jury must form their opinion whether the party had authority to act, or whether he confined himself within the boundaries of such authority. There is no difference between a soldier and any other citizen, but by the Mutiny Act. That gives the King the power of deciding over offences, but is an officer to be deprived of his character and commission, without the parties giving testimony against him, being examined on oath? Surely, that is not too great a favour for a subject to ask. As to the cases put, of a Secretary of State or a Governor, they are both acting legally within their authority, and would be justified in refusing to disclose communications made to them in their respective characters as such, but here, there is no legal power to appoint such a Court as a Court of Inquiry; and therefore, it is impossible to say that these cases stand on the same footing. If the Court be of itself illegally constituted, it was not compulsory on the defendant and other officers forming it to make the inquiry, and it would be no defence for them to say, that they were commanded by the Sovereign. It has been said, that when an officer enters the army, he voluntarily submits to all its regulations, but he merely submits to the provisions contained in the Mutiny Act, and a trial by Court Martial. Further, it has been stated, that a report of a Committee of the House of Lords or Commons could not be received in evidence, but the ques-

tion of privilege is wholly undefined, and there is no legal authority for such a position. There is a wide distinction however, between those Houses and the King, as the latter cannot direct any person to be confined, which the former are empowered to do for a breach of their privileges. A Court of Inquiry has been assimilated to a Grand Jury, but the latter only give their opinion whether the party charged is to be put on his trial or not. That is a protection to the subject; but here, the opinion of the Court had the effect of passing condemnation on the plaintiff, for he was in consequence dismissed from the army. In *Sir John Mordaunt's* case, which is the earliest to be found in print, a Court Martial followed the inquiry, and he complained that such inquiry prejudiced the Court against him. Here, it does not appear that the members composing the Court were ordered to give their opinion; how, then, can it be ascertained whether they kept within the scope of their authority, unless the report of their proceedings be produced? It has been said, that the King is at the head of the army. So he is at the head of the church, as well as of the law; and if he has the power contended for over the army, he has it in every other instance. It is not to be supposed that he will do any thing unjust, but he must act by others; and if this power be established, the character of every individual in the country is at stake, and at the mercy of the Crown. As to the cases of a Bishop or Archbishop, they differ but little from the present, but no instance has been cited, where either of these personages has deprived a clergyman of his situation, without bringing his conduct before an Ecclesiastical Court. It is quite clear, that a revenue officer is not bound to produce the books of the revenue, but there is no similarity between that case and the present. There, the party had no right either to the original or a copy of such documents. Here, however, the plaintiff was served with a copy of the report, and was ready to produce it at the trial, but was refused to do so. The result of the Court of Inquiry was known to the world as soon as the members com-

1800.

 House
 v.
 BENTINCK.

1820.
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 Houn  
 v.  
 Berridge.

posing it had formed their opinions; and it is too much to say, that the plaintiff's character and reputation may be destroyed by any false or malicious publication that may spring from a Court so constituted and appointed.

Lord Chief Justice DALLAS.—A great deal of matter has been gone into in the argument at the bar, which does not seem to us to be connected immediately with the present subject, and the only question now before us is, whether the minutes which were offered in evidence at the trial were properly rejected:—this depends upon the nature of the proceeding; and, therefore, it is necessary to examine in the first instance what that proceeding was. The action was brought for a libel. The plaintiff was an officer in the army, a Lieutenant-Colonel, and a Captain in the Third Regiment of Foot Guards. The defendant is a Major-General, and at time of the transaction in question, was a Colonel in the army. In consequence of certain transactions or suspicions, supposed to be derogatory to the character of the plaintiff as a gentleman and an officer, his Royal Highness the Commander in Chief, did what we all know is frequently done upon occasions of this nature, and as I for one, have no hesitation in saying, is most beneficially done, and instead of being the exercise of an act of severity, is very frequently that of tenderness and mercy to the party. Instead of bringing the plaintiff formally before a Court Martial, in the first instance, the Commander in Chief directed an inquiry to be made, by the holding of a Court for that purpose. The proceeding was therefore in its very nature an official proceeding, directed by the Commander in Chief, to obtain that information which he was bound to obtain, as to the conduct of every officer holding a commission in his Majesty's army; and in furtherance of the exercise of his public duty on the result of such inquiry, whether it was to cease in the first instance, or lead to any

ulterior measure. The consequence of this was, that a Court of Inquiry was held, of which the defendant was the presiding officer, and that Court was held in consequence of a duty created by the order of the Commander in Chief, which was imperative on the defendant; and a report made by him in conjunction and connexion with the officers, was an act of duty imposed on him, as a military man, by his superior, the Commander in Chief, whose order he was bound to obey. We have heard a great deal in this case, with respect to the nature of such a Court as a Court of Inquiry. Whether those Courts were instituted in the year 1758, or preceded it, is to me perfectly immaterial in my view of the case; for we all know, that (at least from that time up to the very hour when the present Court of Inquiry was held,) considering to what greatness and glory the armies of this country have arrived, the convenience at least of this practice has been such, that no man has ever been deterred from entering into the army on that account; and it is quite impossible not to see, that the plaintiff in this case, when he became an officer in the army, knew, that in point of fact, at least, he subjected himself to that Court of Inquiry, to which he must have known, that in other instances, other officers had been made amenable, and to which he voluntarily, and by choice, subjected himself, by becoming such officer. The evidence in question, was the result of the inquiry of that Court, delivered by the defendant to the Commander in Chief, in the exercise of his military duty, and retained by the Commander in Chief as an official document in the possession of his Secretary Sir *Henry Torrens*. It originated therefore, in a military order of a person holding a high and responsible office under the Crown; it was executed in consequence of such order, and returned and deposited in the office of the Commander in Chief, in which all official acts of such a description ought to be deposited. The only question then is, whether under these circumstances, I will not say Sir

1820.

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**HOMER**  
 v.  
**BENTINCK.**



1820.  
HOMES  
v.  
BENTINCK.

*Henry Torrens* would have been compelled to produce the result of this inquiry, but whether if he, under a mistake, had been disposed so to do, it would not have been the bounden duty of the Learned Judge, before whom the cause was tried, considering that this was in the nature of a secret document, and not the privilege of the party holding it, but of which he was a mere trustee on behalf of the public, to have interposed and prevented such evidence being given. Before I examine the few instances alluded to, as being applicable to cases of this description, let us first ascertain upon what ground and principle the present case rests. It is agreed, that there are a number of cases of a particular nature, in which, for reasons of state and policy, information is not permitted to be disclosed. To begin with the ordinary cases, and those of a general description in Courts of Justice. In these Courts, on reasons of public policy, persons are not to be asked the names of those from whom they receive information, viz. as to frauds on the revenue. So, in all trials for high treason, of late years, the same course has been adopted, and even if parties were willing to disclose the source from which they acquired their information, the Judges would interfere and not allow them to do so. What is the ground upon which these cases stand, except the danger to the public good which would result from such disclosure, for no person would become an informer if his name were allowed to be disclosed in a Court of Justice, and he might thereby be subjected to the resentment of the party against whom he had informed. Does not this reason, even if it rested here, apply closely to the case now before us? It is an inquiry directed to be made by the Commander in Chief, with a view to ascertain what the conduct of the party suspected might have been, in the course of which, a number of persons may be called before the Court, and give information as witnesses;—however, they would not choose to have the com-

munications made by them disclosed ; but if the minutes of such Court are to be produced in evidence in an action brought by the party, then it goes to reveal the name of every witness, and the nature of the evidence given by each ; and not only this, but it goes also to reveal what has been said or done by each member of the Court of Inquiry during the time of its sitting. It seems, therefore, that if the report in question had been received in evidence, it would tend directly to disclose that which was not permitted to be disclosed ; and therefore, independently of the character of the Court of Military Inquiry, I should say, on the broad ground of public policy and convenience, that these matters, secret in their natures, involving matters of delicate inquiries, and the names of persons, stand protected, and ought not to be disclosed. The only case which has been referred to, as being more immediately in point, is that of *Wyatt v. Gore* (a), where the witness proposed to be examined was the Attorney-General of the province, who was called, and asked as to the nature of some communications made to him by the defendant, relative to the plaintiff's conduct.—Mr. Serjeant *Lens*, for the defendant, objected to this evidence, and said, that “ it would be highly indecent for a public officer to disclose what passed between him and the Governor upon that occasion, and that it was a confidential communication.” Now, what was this report, in its very nature, but a confidential communication, directed by the Commander in Chief for the information of his own conscience, in the exercise of his public duty, as to whether he should suffer the plaintiff to continue an officer or not, in a case in which it must be agreed and admitted, that, independent of any inquiry whatever, his Majesty, in the exercise of his prerogative, might have dismissed him at any time ? Then, in deciding on the validity of the objection raised in *Wyatt v. Gore*, Lord

1820.  
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 HOME
 v.
 BENTINCK.

(a) 1 Holt, Ni. Pri. Cas. 299.

1820.
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 HOME  
 v.  
 BENTINCK.

Chief Justice *Gibbs* said, "the witness is not bound to answer, and in delicacy he will not answer such questions. Whether the conversations in which reference was made to the plaintiff's (Mr. *Wyatt's*) conduct as Surveyor-General were on public or private business, they ought not to be disclosed. The Governor consults with a high legal officer upon the state of his colony, what passes between them is confidential. No office of this kind could be executed with safety, if conversations between the Governor of a distant province and his Attorney-General, who is the only person on whom such Governor can lean for advice, were suffered to be given in evidence."—Now, what is this proceeding, but consulting with those who are bound to give the advice which is required as to the exercise of a public duty? and whether it be the case of an Attorney-General of a province, advising the Governor, or of an officer presiding at a Court of Inquiry, directed to be held by the Commander in Chief, it is equally a case of advice and information to be given to him by such Court for the regulation of a public officer. It seems, therefore, upon the broad principle of state policy and public convenience, and within the principle of all the cases cited, that the learned Chief Justice of the King's Bench was perfectly right, in not allowing these minutes to be admitted in evidence at the trial, and consequently that this judgment must be

Affirmed (a).

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(a) In *Jekyll v. Sir John Moore*, 2 *New. Rep.* 341, it was held, "that if a Court-Martial, after stating in their sentence the acquittal of an officer against whom a charge has been preferred, subjoin thereto a declaration of their opinion, that the charge is malicious and groundless, and that the conduct of the prosecutor in falsely calumniating the accused, is highly injurious to the service, the president of such Court Martial is not liable to an action for a libel, for having delivered such sentence and declaration to the Judge Advocate."

1820.

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HAWKINS v. EDWARDS.

Monday,
June 19.

MR. Serjt. *Vaughan*, on a former day in this Term, had obtained a rule *nisi*, that the proceedings in this cause might be set aside for irregularity, on the ground that the process was sued out, and the proceedings carried on in the name of *Luttrell* by *Yeates*, meaning, as it was contended, *John Yeates*, of *Temple Place*. He founded his motion on affidavits, which stated, that neither of them were attorneys of this Court. That the only person upon the rolls of the Court, resident in *London* by the name of *Yeates*, was a Mr. *Thomas Yeates*, who was a different person from the one named in the process, and who had a different residence.

Where process appeared to be sued out in the name of *A.* by *B.* neither of whom were attorneys of this Court, and *B.* had no authority of any other attorney to act in his name, the Court set aside the proceedings, and ordered *A.* and *B.* to pay the costs.

Mr. Serjt. *Ouslow* was on this day about to shew cause, when on Mr. Serjt. *Vaughan*'s producing an affidavit of *Thomas Yeates*, that he had never given any consent in writing or otherwise, for the above-mentioned *Luttrell* or *Yeates* to sue out process, or carry on proceedings in this Court in his name, and that on search being made, no other person by the name of *Yeates*, resident in *London*, than the said *Thomas Yeates*, was enrolled as an attorney of this Court.

The rule was made absolute, with costs, to be paid by *Luttrell* and *John Yeates* (a).

(a) See the statute 2 Geo. 3. c. 23. s. 10. by which it is enacted, that it shall be lawful for any person who shall be sworn, admitted, and enrolled an attorney in any of his Majesty's Courts of record at *Westminster*, with the consent of any attorney in any of the said other Courts of record, such consent being in writing, signed by such attorney, and in the name of such attorney, to sue out any writ or process, or commence, prosecute, or defend any action or other proceedings in such Court, notwithstanding such person is not sworn or admitted to be an attorney of such Court. And by 22 Geo. 3. c. 46. s. 11, it is provided, that if any sworn attorney shall act as agent for any person not duly qualified to act as an attorney, or suffer his name to be any ways made use of upon the account, or for the profit of any unqualified person, or send any process

1820.

Tuesday,
June 20.PHILLIPS, Demandant; NOUNE, Tenant; LISLE,
Vouchee.PHILLIPS, Demandant; WHITTAKER, Tenant; LISLE,
Vouchee.

The Court refused to allow the amendment of two recoveries, the one suffered in the reign of *Will. & Mary*, and the other in *Geo. 1.*, by the insertion of the word "*tithes*," it not appearing that the parties were in possession of such tithes at the time the recoveries were suffered, although the word "*hereditaments*" was contained in the deed to lead the uses.

MR. Serjt. *Pell*, moved that two recoveries, the first of which had been suffered in *Trinity Term*, 1 *Will. & Mary*, and the other in *Hilary Term*, 13 *Geo. 1.* might be amended, by inserting the word "*tithes*." By the deed to make the tenant to the *præcipe* in the first recovery, the manors of *B.* and *C.* were conveyed to *Noune*, then in the occupation of a person therein named, and all other the manors, messuages, services, rents, lands, tenements and "*hereditaments*" of the releasors, or either of them, situate in the county of *Southampton* and the Isle of *Wight*; and by the deed to lead the uses of the second recovery, the before-mentioned "*hereditaments*" and premises were conveyed to *Whittaker*, to make him tenant to the *præcipe*. It appeared by affidavits, that the lands in question had been granted to two persons by *James the First*, and that from the time of such grant to the year 1775, the lands had been discharged from tithes. That in that year they were conveyed to two persons, one of whom afterwards conveyed his moiety to the other, who occupied the whole, and never paid tithes. That in 1805 he sold the pro-

to such unqualified person, thereby to enable him to appear, act, or practice in any respect as an attorney, knowing him not to be duly qualified, and complaint shall be made thereof, in a summary way, to the Court from whence any such process did issue, and proof made thereof upon oath, to the satisfaction of the Court, that such sworn attorney hath offended therein as aforesaid, then every such attorney so offending, shall be struck off the roll, and for ever after disabled from practising as an attorney. In *Oppenheim v. Harrison*, 1 *Burr.* 20, where an attorney's name was set to process without his authority, the Court ordered the proceedings to be set aside, and granted an attachment against the plaintiff's attorney. So, in *Hopwood v. Adams*, 5 *Burr.* 2660, where judgment was entered up by an attorney's clerk, in the name, but without the knowledge or consent of a regular attorney, it was ordered to be set aside.

perty, and on the purchaser's being called on to complete the sale, he refused to do so, on the ground that the word "*tithes*" was not contained in either of those recoveries. Under these circumstances, the learned Serjeant submitted, that the word "*hereditaments*" being inserted in both the deeds to make the tenant to the *præcipe*, it was sufficiently comprehensive to embrace the tithes in question, and he cited the cases of *Cullum*, demandant, *Ryder*, tenant, *Vernon*, vouchee (a), where a recovery was allowed to be amended by inserting "*tithes*," the lands having been tithe-free beyond memory, although no legal reason could be shewn for their discharge; *Corden*, demandant, *Hall*, tenant, *Colclough*, vouchee (b), where the word "*tithes*" was inserted in a recovery; the deed to lead the uses having conveyed all the "*hereditaments*" to the vouchee; and *Collyer*, demandant, *Lord Chesterfield*, vouchee (c), where a similar amendment was allowed, where possession had followed the deed, and it appeared that the tithes were intended to pass.

1820.

PHILLIPS,
Demandant.

But as it did not satisfactorily appear that the parties were in possession of the tithes at the time the recoveries were suffered, the Court

Refused the amendment (d).

(a) 7 *Tamnt.* 341. — (b) 2 *New. Rep.* 431. — (c) 4 *Tamnt.* 226.

(d) Mr. Justice Burrough was of opinion that the tithes would pass under the word "*hereditaments*." So, in *Dowse*, demandant, *Lloyd*, tenant, *Reeve*, vouchee, 2 *Bos. & Pul.* 578, a recovery was amended by inserting the words "all and all manner of tithes whatsoever, yearly arising, &c. from and out of the said premises," on an affidavit setting out the vouchee's right to the tithes, and stating his intention to have passed all his interest in the premises, the word "*hereditaments*" being contained in the deed to lead the uses, but the Court afterwards refused to amend a recovery, by adding the "*tithes*" of the premises under the word "*hereditaments*," where that word did not occur in the operative part of the deed; *Garle*, demandant, *Oram*, tenant, *Mason*, vouchee, 2 *Marsh.* 194. Nor, by striking out a portion of tithes and substituting all the tithes arising from the lands conveyed; *Ross*, demandant, *Willaken*, tenant, *Worge*, vouchee, 2 *Marsh.* 195. But in *Tennyson*, demandant, *Goulton*, tenant, *Rousby*, vouchee, 3 *Tamnt.* 408, a recovery suffered ninety-eight years ago, was amended by inserting a manor and tithes, without affidavit of intention that they

1820.

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 PHILLIPS,
 Demandant.

should pass, the intent being manifest from the deed, and the possession having gone accordingly, although there was no other evidence of the existence of a manor, than the mention of it in an old deed, and the appointment of a game-keeper. See also *Ex parte Bullock*, 5 Term. 748, *Lancaster*, demandant, *Wilmot*, tenant, *Boone*, vouchee, *ante*, vol. i. 95, *White*, demandant, *Bicknell*, tenant, *Papillon*, vouchee, *ante*, vol. ii. 299, and *Williamson*, demandant, *Meggison*, tenant, *Bourmont*, vouchee, *ante*, p. 49, as to the terms in which recoveries have been allowed to be amended by the insertion or substitution of the word "tithes."



Wednesday,
 June 21.

TURNOR v. TURNER.

In an action by the assignee of the sheriff on a replevin bond, conditioned for the plaintiff in replevin to appear at the County Court and prosecute his suit with effect, and make a return of the goods distrained, if it should be adjudged; and the plaintiff in replevin, after removing the plaint into this Court, became

nonsuit: Held, that he had thereby not prosecuted his suit with effect, and that the condition of the bond was broken; that the avowant had his election of proceeding by a writ *de retorno habendo*, or issuing a writ of inquiry under the statute 17 Car. 2. c. 7. s. 2. Therefore, where to a declaration against one of the sureties on the bond, averring, that the plaintiff in replevin did not prosecute his suit with effect;—a plea stating the writ of inquiry and judgment to recover the arrears of rent found under 17 Car. 2. is no bar to the action on the bond, and is had on general demurrer, it not shewing that any execution had issued on the judgment, or that the sum recovered had been levied and paid to the avowant before action brought.

If judgment be given against the plaintiff in replevin for not prosecuting his suit with effect, his sureties on the bond will be answerable to the avowant, notwithstanding he has afterwards proceeded on the 17 Car. 2. c. 7. s. 2. and obtained a judgment under a writ of inquiry, in pursuance of that statute, to recover the arrears of rent and costs.

due, and that he, within five days afterwards, made his complaint to the then Sheriff of *Lincoln*, and prayed him that the said cattle, &c. might be replevied, and that the Sheriff accordingly took a bond, conditioned as aforesaid, proceeded to set out that the Sheriff replevied and made deliverance of the said cattle, &c. to *Watmough*, who appeared at the then next County Court of the said Sheriff, and levied his plaint against the plaintiff, for taking and unjustly detaining the said cattle, &c., and found pledges, as well for prosecuting his plaint as for returning the said cattle, &c., if a return thereof should be adjudged; which plaint, afterwards to wit, in *Easter Term*, 55 *Geo. 3.* was duly removed, at the instance of the plaintiff into this Court, by virtue of a writ of *recordari facias loquelam*. That thereupon *Watmough*, in *Trinity Term*, 55 *Geo. 3.* declared against the plaintiff, for taking and unjustly detaining his said cattle, goods, and chattels. (The declaration in replevin was here set out, and an avowry by the plaintiff for two quarters rent in arrear, and due to him from *Watmough*). That upon this, the plaintiff prayed that *Watmough* might plead in bar to the avowry, and that a day was thereupon given to him so to do, but that he made default, nor did he plead in bar to the said avowry, nor further prosecute his suit against the plaintiff, whereupon it was considered by this Court, in that same *Trinity Term*, that *Watmough* should take nothing by his said plaint, but that he, and his pledges to prosecute, should be in mercy, &c., and that the plaintiff should have a return of the said cattle, &c., as by the record and proceedings thereof which have since been duly removed from this Court into the King's Bench, for certain supposed causes of error therein, and which are now remaining in the said last-mentioned Court, in all things affirmed more fully appears. The plaintiff then averred that *Watmough* did not prosecute his suit with effect and without delay, against him for taking the said cattle, &c., whereby the bond became forfeited to the Sheriff, who afterwards assigned it to the plaintiff.

1820.

TURNOR
v.
TURNER.

1820.
 ~~~~~  
 TURNOR  
 v.  
 TURNER.

The defendant pleaded in bar, that after the recovery of the said judgment in the said declaration mentioned, to wit, in *Trinity Term, 55 Geo. 3.* the plaintiff prayed the writ of our Lord the King to be directed to the Sheriff of *Lincoln*, to enquire the amount of the arrear of rent, and of the value of the cattle, goods, and chattels so distrained as aforesaid, and that it was granted to him, &c. That such writ was duly executed, and that it appeared, by an inquisition taken before and returned by such Sheriff, that £367. 10s. was in arrear and owing from *Walmough* to the plaintiff for rent, and that the cattle, goods, and chattels taken were worth that sum; and that thereupon it was considered by this Court, that the plaintiff should recover against *Walmough* the said sum of £367. 10s. being the arrears of rent found by the inquisition, and £79. 4s. for his costs and charges, and that the plaintiff should have execution thereof, &c. To this plea the plaintiff demurred generally, and the defendant joined in demurrer. The cause came on for argument in the course of the last Term, when

Mr. Serjt. *Blosset*, in support of the demurrer, submitted, that the question was, whether the bond on which the action was brought, was forfeited or not, by the plaintiff in replevin not having prosecuted his suit with effect, as averred in the declaration, and if so, whether the present plaintiff's right of action was affected by his having afterwards proceeded on the statute 17 *Car. 2. c. 7.* as stated in the plea, it not appearing that he was satisfied by such proceeding. The plea does not affect or answer the declaration in any respect. The condition of the bond was, that the plaintiff in replevin should prosecute his suit with effect, and make a return of the goods if a return thereof should be adjudged. The plea merely avers that a return was made, but does not go on to state that *Walmough* prosecuted his suit with effect against the plaintiff for taking his goods; it is therefore ill, and affords no substantial defence to the present action. The general rule of law is, that where

a bond is conditioned to do several things, it is forfeited by the non-performance of one, and if it be once forfeited, it must always remain so. The distinction is, when an obligation is in the alternative or disjunctive. Here, what damage the plaintiff may have sustained in consequence of the breach of the condition to prosecute with effect, is altogether another consideration; but it does not appear by the plea in bar, that he has derived any fruit from the judgment, or that it has been in any way satisfied. The object of the bond was to secure to the present plaintiff the costs he might be put to in the suit, as well as the amount of the rent in arrear, and the sureties are liable for such costs to the extent of the penalty contained in the bond. The parts of the condition are wholly distinct, and a discharge of one does not amount to a discharge of the whole. In *Morgan v. Griffith* (a), Lord Chief Justice *Lee* said, "In all replevin bonds there are several independent conditions; one to prosecute, another to return the goods replevied, and a third to indemnify the Sheriff, and a breach may be assigned upon any of these distinct parts of the condition." The condition to prosecute with effect was instituted by the statute 11 Geo. 2. c. 19, instead of proceeding against the pledges at common law. The condition to make return, as provided by that statute, was taken from the custom of having pledges *de retorno habendo*, which were introduced by the statute *Westminster* 2. c. 2. and were wholly distinct and independent from the pledges to prosecute with effect. Previously to the 11 Geo. 2. c. 19, the practice was for the Sheriff to take a bond from the pledges in replevin. But that statute goes further, and gives the defendant in replevin an additional security, the bond being taken in a definite sum (viz. double the value of the goods distrained), and made assignable to such defendant, who may sue on it in his own name. It is sufficient in an action

1822.

TURNOR  
v.  
TURNER.

---

(a) 7 Med. 381.

1820.

TURNOR  
v.  
TURNER.

on such bond, to assign a breach of one part of the condition only. If, therefore, it be alleged that the suit was not prosecuted with effect, it is unnecessary to state a breach of the others. In *Vaughan v. Norris* (a), where in a replevin bond the condition was to appear in the County Court, and then and there prosecute with effect, and the breach assigned was, that he did not prosecute with effect, and the defendant pleaded that he did, to which the plaintiff replied that he (the then defendant) removed the cause by *recordari* into the Common Pleas, and was there nonsuited, such replication was held good on demurrer. That shews that it is immaterial to point out what judgment followed. In *Dias v. Freeman* (b), it was held, that the bond was forfeited if the plaintiff in replevin does not appear in the County Court and prosecute according to the condition, and there no judgment whatever could be given. In *Gwillim v. Holbrook* (c), it was decided, that the condition is not satisfied by a prosecution of the suit in the County Court, but that the plaintiff, if removed by *recordari facias loquelam* into a superior Court, must be prosecuted *there* with effect. The legal meaning of prosecuting with effect is to prosecute with success, the object of the condition of the bond being to give the party security for costs. In *Morgan v. Griffith* (d), Lord Chief Justice Lee, in delivering the judgment of the Court said, that "In all these sorts of bonds to prosecute with effect, the plaintiff must not only proceed to a decision of the suit, but must have success in it, or he does nothing." In *Hussey v. More* (e), it is said, "that for the King's and party's benefit the plaintiff ought to find pledges; that if he be nonsuited, he and his pledges shall be amerced, or if the verdict finds against him in any part he was to be amerced; which was grounded upon great reason, that the

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(a) *Cas. Temp. Hardw.* 137.—(b) 5 *Term Rep.* 195.—(c) 1 *Bos. & Pul.* 410.—(d) 7 *Mod.* 381.—(e) *Cro. Jac.* 414. *S. C. Vin. Abr. tit. Pledges, (A).*

plaintiff should not trouble the King's Court or the party, without cause; and if he did, he should be punished." In *Gilbert on Replevin* (a), it is stated, that "when the avowant had judgment for a return of the beasts, he had very often no benefit by his suit, because it frequently happened, that, pending the suit, the tenant had sold the cattle delivered to him on the replevin, and become insolvent. The mischief arose from this, that the Sheriff could only take from the plaintiff *plegiū de prosequendo*, in this, as in other actions; which pledges were only to answer the amercement to the King *pro falso clamore*, and looked no further; and even these being very small, did soon degenerate into mere matter of form." Pledges in replevin, therefore, stand on the same footing as pledges in other actions, and not in the nature of those which were formerly taken *de retorno habendo*. In *The Duke of Ormond v. Bierly* (b), where an action was brought on a replevin bond to prosecute with effect, and also to make return, the defendant pleaded that *E. G.* levied a plaint, and afterwards, and before the suit was determined, died; and the plaintiff replied, that it was true that *E. G.* had levied such a plaint against the defendant, who immediately afterwards exhibited an English bill in the Exchequer against the plaintiff in that suit, and by injunction hindered the proceedings below until such a day, &c. on which day the said *E. G.* died, so that he did not prosecute his suit with effect. On demurrer to this replication, Lord Chief Justice *Holt* said, "this was a prosecution with effect, because there was neither a nonsuit or verdict against *E. G.* and so it is upon a recognizance on a writ of error, which is also to prosecute with effect, if the plaintiff is not nonsuit, nor the judgment affirmed, the recognizance is not forfeited." By the statute 4 *Anne*, c. 16. s. 16, it is enacted, "that no claim, or entry to be made on lands, shall be of any force or effect to avoid

1820.

  
 TURNOR  
 v.  
 TURNER.

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(a) 3d edit. 95.——(b) Carth. 519. S. C. 12 Mod. 380.

1820.  
 ~~~~~  
 TOANOR
 v.
 TURNER.

any fine levied with proclamations, according to the statute, or a sufficient entry within the statute of limitations, unless upon such entry an action shall be commenced within one year next after the making of such entry or claim, and prosecuted with effect;" and therefore if the claimant fail in an ejectment, brought in consequence of the entry, and have not time to commence a second ejectment within twelve months after the making of the entry, a second entry must be made. It is clear that a defendant in replevin may resort to his *retorno habendo*, and enter up judgment for a return, and still pursue the remedy afforded him by the statute 17 Car. 2. for executing a writ of inquiry, as that statute merely gives an additional remedy, and does not take away the right afforded by the common law. Whatever effect, therefore, the judgment to make a return, or the return itself may have towards satisfying that part of the condition "to make a return," still, it cannot operate so as to affect the other part of it, "to prosecute with effect." *Cooper v. Sherbrooke* (a), *Baker v. Lade* (b), and in the former case Mr. Justice Bathurst observed, that "the statute 17 Car. 2, has not altered the judgment at common law, but only given a further remedy to the avowant." Here, therefore, the bond being conditioned in conformity to the statute 11 Geo. 2. c. 19. s. 23, to prosecute the suit with effect, and without delay, was forfeited by the plaintiff in replevin letting judgment go by default, and on such forfeiture the avowant (the present plaintiff) was authorised by that statute to take an assignment of the bond, and proceed thereon against the sureties, who are liable for the costs he may have sustained to the extent of the penalty of the bond. *Yea v. Lethbridge* (c); and in *Page v. Eamer* (d), the Court observed, that "at common law the pledges were only bound to answer for the amerciament *pro falso clamore*, but that as the security was now taken by bond, the Court would not

(a) 2 Wils. 117. — (b) Carth. 253. — (c) 4 Term Rep. 433. —
 (d) 1 Bos. & Pul. 379.

relieve against the penalty without obliging the surety to pay costs."

1820.

TURNOR
v.
TURNER

Mr. Serjt. Cross, *contra*.—The main question in this case turns on the construction to be given to the 23d section of the 11 Geo. 2. c. 19, which has extended the rights of an avowant or defendant in replevin, by affording him two sureties in a bond to be taken in double the value of the goods distrained, and which may be assigned to such person by the sheriff, in order that he may sue on it in his own name. The conditions of the bond, as required by that statute, are in the alternative, *viz.* that the party shall prosecute his suit with effect,—without delay,—or that he shall make a return of the goods. If it were otherwise, although the defendant might have obtained and been satisfied by such return, he might still proceed on the replevin bond against the sureties for damages and costs. Where a party cannot obtain judgment for a return of the goods, he may sue on a breach of the condition for not prosecuting with effect:—But he cannot do so, if a return has been adjudged. In *Baker v. Lade* (a), there were two judgments, the one, that the defendant should have a return, and the other, that he should recover the arrears of rent, although the proceeding was under the statute 17 Car. 2. c. 7 (b), and on error, that the judgment was double, *viz.* one at common law, and the other by the statute; the Court observed, that as the statute did not alter the judgment at common law, it was well given. In *Comyn's Digest* (c), it is said, "that in replevin in the County Court, removed by *recordari*, and a verdict for the avowant, and an inquiry as to the value, pursuant to the statute 17 Car. 2. c. 7, the avowant shall not

(a) Carth. 253.——(b) See the second section of this statute, *post*, page 617.——(c) Tit. *Pleader*, 3. K. 31.


1820.

 TURNOR
 v.
 TURNER.

have the replevin bond delivered to him to sue the parties; but must either have judgment and execution for the sum settled by the jury, pursuant to that statute, or he must take the ancient remedy, which is, to have a writ *de retorno habendo*;" and *Combes v. Cole* (a) is cited in support of that passage. The sureties are merely bound to see that a return is made, but can the avowant, instead of endeavouring to obtain a return, turn round on the sureties in the first instance, and be entitled to recover at law from them? In the present case, the defendant has waived the benefit of the judgment for a return, by suing out a writ of inquiry by virtue of the statute 17 Car. 2. under which, judgment for damages has been entered up against the plaintiff in the original action, by which he is entitled to sue out an execution against him for damages and costs, and such execution would not only enable him to take all the goods he could have taken under the judgment for a return, but the value of all such goods, together with his costs. The judgment for the return is consequently merged by that obtained on the writ of inquiry, as, under the latter, all the goods the original plaintiff might have, would be liable to be taken in execution under a writ of *feri facias* sued out on such judgment. In *Cooper v. Sherbrooke* (b), Mr. Justice Bathurst said, that "the legislature intended by the statute 17 Car. 2, that the proceeding on that statute by writ of inquiry, *feri facias*, and *elegit*, should be final for the avowant to recover his damages, and that the plaintiff was to keep his cattle, notwithstanding the course of a writ *de retorno habendo*;" and in *Tidd's Practice* (c), it is stated, that "if a defendant in replevin proceed upon the statute 17 Car. 2. c. 7, for the arrearages of rent and costs, he cannot have a writ of *retorno habendo*, nor consequently proceed against the pledges."—At all events, if this be not an

(a) *H. 10 Geo. 2. B. R. H. 352.*—(b) *2 Wils. 117.*—(c) *Vol. I. 7th Edit. page 1056.*

established principle of law, the declaration in the present case does not allege a sufficient breach to entitle the plaintiff to recover. It merely states, that by a judgment at common law, it was awarded that the plaintiff should have a return, but it does not aver that no return was made, and assigned for breach of the condition of the bond, that the suit was not prosecuted with effect. When judgment was entered up for the return, the obligation to prosecute the suit with effect was at an end. It therefore should have been expressly alleged, that no return was made, and the breach should have been assigned accordingly. All the precedents shew that such an allegation is necessary, viz. either that the party did not prosecute with effect, because no judgment had been obtained, or that there was a judgment but no return made. Under these circumstances, therefore, the declaration is not only defective, but the plaintiff, in point of law, has waived the advantage he might have derived from proceeding against the sureties on the bond, by having taken the benefit afforded him by the 17 Car. 2. c. 7.

1820.

 TURNOR
 &
 TURNER.

Mr. Serjt. *Blosset*, in reply.—The substantive breach of the condition is substantially set out in the declaration, viz. that the plaintiff in replevin did not prosecute his suit with effect—and whether the judgment were for a return or not, is wholly immaterial. The condition to prosecute with effect, is wholly distinct from making a return of the goods, as it has been decided in *Cooper v. Sherbrooke*, that even where there has been a judgment for a return, the party is not prohibited from proceeding under the statute 17 Car. 2. That statute, therefore, does not at all affect the proceedings at common law, and it is consequently unnecessary to shew that no return has been made, or that the plaintiff had not obtained the fruit of his judgment by such return. Besides, the conditions of the bond are not in the alternative, and if one has been broken, the breach of the other may be altogether omitted in the declaration. The case of *Baker v.*

1820.

 TURNOR
 v.
 TURNER.

Lade goes expressly to shew that the remedy afforded by the statute 17 Car. 2. is cumulative, and does not affect the common law. *Vaughan v. Norris*, was decided before the statute 11 Geo. 2. c. 19, was passed, and the condition being to appear in the County Court, and then and there prosecute with effect, the Court held, that the removing the cause by *recordari* was a breach of the condition, as the words *then and there* related to so much of the prosecution as should be in the County Court, but did not restrain it. Sureties in a replevin bond are liable in three instances, viz. if the plaintiff in replevin does not prosecute his suit with effect;—without delay;—and make a return of the goods, if such return should be adjudged. If, therefore, the avowant had obtained judgment for a return, which was not duly made, he might have recourse to the sureties on the bond, as by such return being merely awarded, it is most manifest that the plaintiff in replevin had not prosecuted his suit with effect. As to the passage cited from *Tidd's Practice*, no authority is referred to in its support, besides, it is confined to a case where a party does not make a return of the goods, and cannot extend to or affect the breach for not prosecuting with effect.

Cur. ado. vult.

Lord Chief Justice DALLAS, on this day, having briefly recapitulated the pleadings, delivered the judgment of the Court as follows:—

The only question now is, whether the defendant's plea is a good bar to the present action, which the plaintiff has brought against him as one of the sureties in a replevin bond, the condition of which is set out in the commencement of the declaration; and appears to have been, that *Jonathan Watmough* (the plaintiff in replevin), should prosecute his suit with effect against the present plaintiff, for taking and unjustly detaining his cattle, goods, and chat-

tels, and make a return thereof, if a return should be adjudged. The Court are of opinion, that the condition of the bond was broken, by the plaintiff in replevin becoming nonsuit, as by so doing, he did not prosecute his suit with effect. Although it appears by the declaration, that a return of the cattle, goods, and chattels, was awarded, yet we think that the present plaintiff, as avowant in that action, had his election, whether he would proceed by a writ *de retorno habendo*, or by the course which he has adopted, viz. the issuing of a writ of inquiry, under the statute 17 Car. 2. c. 7. If the Court were to decide, that the plea in question was a good bar to the plaintiff's action, it would follow, that an avowant, or person making cognizance for rent, would not derive from the sureties in the replevin bond, the benefit which was intended to be given to the former by the 11 Geo. 2. c. 19. s. 23. The statute 17 Car. 2. c. 7, s. 2. enacts, "that whosoever any plaintiff in replevin shall be nonsuit before issue joined, the defendant, making a suggestion in nature of an avowry or cognizance, for the rent, to ascertain the cause of distress, the Court, upon his prayer, shall award a writ to inquire by a Jury touching the sum in arrear at the time of the distress, and the value of the goods distrained, and upon the return of the inquisition, the defendant is to have judgment to recover against the plaintiff the arrearages of such rent, in case the goods distrained shall amount to such value;" and similar provisions are made, where the plaintiff becomes nonsuit after cognizance or avowry made, as was done in the present instance. The parties to the replevin suit, are the person whose goods are distrained, and the avowant, or person making the distress. Previously to the statute 11 Geo. 2. c. 19, if the person whose goods were distrained, was of little worth, so that the avowant, or person making cognizance for rent, could have no fruit of his judgment on the inquisition, under the statute 17 Car. 2, he was driven to an intricate proceeding against the Sheriff, if he had not

1820.

TURNOR
v.
TURNER.

1830.
TURNOR
v.
TURNER.

taken sufficient pledges, which by former statutes he was directed to do, or to proceed in the Sheriff's name against the pledges taken by the Sheriff, if he had taken a bond from the pledges. It being found, that great delays and inconveniences attended this course of proceeding, the legislature, in the eleventh year of the reign of *Geo. 2*, "to prevent vexatious replevins of distresses taken for rent, enacted (a), that all Sheriffs, and other officers having authority to grant replevins, may and shall, in every replevin of a distress for rent, take in their own names, from the plaintiff, and two responsible persons as sureties, a bond in double the value of the goods distrained (such value to be ascertained by the oath of one or more credible witnesses), and conditioned for prosecuting the suit with effect, and without delay, and for duly returning the goods distrained, in case such return should be awarded before any deliverance be made of the distress; and that such Sheriff, or other officer taking any such bond, should, at the request and costs of the avowant, or person making cognizance, assign such bond to the avowant, or person aforesaid, by indorsing the same, on the terms as mentioned in the act." And it then provides, that "if the bond so taken and assigned be forfeited, the avowant, or person making cognizance, may bring an action, and recover thereupon, in his own name." It is quite clear, therefore, from the language of that statute, that the legislature intended to give the avowant, or person making cognizance, a further and additional security, and to place him in a better situation than he was in under the law as it then stood. But this statute has another wise provision; for the persons who framed it, fearing that this indulgence might be used vexatiously, have introduced this clause, namely, that "the Court, where such action should be brought, might, by a rule of the same Court, give such relief to the parties on such bond, as

(a) Section 23.

might be agreeable to justice and reason, and that such rule should have the nature and effect of a defeazance to such bond." If the plea in question had stated, that an execution had issued on the judgment, and the sum recovered had been levied and paid to the avowant, before the present action was commenced, the case would have come before the Court in a very different shape. It is sufficient to say, that this is not alleged. We, therefore, think, that this action is well brought, and that the plea is no bar to it; and if the action shall be enforced, so as to work injustice, the defendant has a plain remedy under the statute 11 Geo. 2, c.19. by an application to this Court for relief.

1820.
~
TURNOR
v.
TURNER.

My Brother *Park* begs me to add, that not having been present at the time of the argument, he has taken no part in this decision.

Judgment for the Plaintiff.

END OF TRINITY TERM.

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AN
INDEX
TO THE
PRINCIPAL MATTERS.

ABATEMENT.

See MISNOMER, 1.

ACCOUNT STATED.

See FIXTURES, 1.
FRAUDS, STATUTE OF, 1.
STAMPS, 1.

ACKNOWLEDGMENT.

See FINE, 3.
RECOVERY, 1. 4. 5.

ACT OF BANKRUPTCY.

See BANKRUPT, 2. 3.

ACT OF PARLIAMENT.

See STATUTES.

ACTION ON THE CASE.

1. In an action on the case, for enticing away the plaintiff's servants, the measure of damages is not to be ascertained at the actual loss he sustained at the time, but for the injury done him by causing them to leave his employment. *Gunter v. Astor, M. 60 G. 3.* Page 12

ADMINISTRATION.

See LEGACY DUTY, 1.
PLEADING, 5.

ADMIRALTY COURT.

See TROVER, 1.

ADVOWSON.

See RECOVERY, 2.

AFFIDAVIT.

See BAIL, 1.

EJECTMENT.

FINE, 2.

RECOVERY, 1. 4. 6.

WARRANT OF ATTORNEY, 1.

1. An affidavit of debt, stating that the defendant was indebted to the plaintiff in the sum of £74, on two bills of exchange, drawn by the plaintiff, and accepted by the defendant, dated on the 11th of *February*, and for goods sold and delivered to, and work and labour done for the defendant by the plaintiff, without stating that the bills were due and unpaid, is insufficient and defective—and the Court will not allow

AGENT.

- a supplemental affidavit. *Sands v. Graham*, M. 60 G. 3. Page 18
2. In shewing cause against a rule which had been previously before a Judge at chambers, the same affidavits cannot be used, unless they are re-sworn and re-stamped. *Chitty v. Bishop*, E. 1 G. 4. Page 413

AFFIDAVIT OF DEBT.

See AFFIDAVIT, 1.

AGENT.

See ATTORNEY, 3.
VARIANCE, 2.

1. A. at Rouen, ordered goods of B. & Co. to be shipped at Bristol, and before the vessel sailed, he directed his agents in London to insure her. B. & Co. having shipped the goods, caused another insurance to be effected, they being ignorant of the former insurance by A. Neither of the policies were cancelled, but that effected by A. was void, on the ground of concealment. In an action against an underwriter by B. & Co. on the policy effected by them:—*Held*, that they were entitled to recover, A.'s agent having directed it to be effected:—*Held* also, that the Jury were warranted in finding that he had an implied authority so to do. *Barlow v. Leckie*, M. 60 G. 3. 8
2. The defendants, as brokers for B. & Co. effected two purchases of seed, both of which were paid for by the latter, and left in the defendant's warehouses for the purposes of re-sale; the first purchase was made on account of B. & Co. and the other for the plaintiffs resident abroad, and by their express order; but the invoices

ANNUITY.

of both were made out in the names of B. & Co., who did not inform the defendants that the latter purchase was not made on their account:—*Held*, that the defendants having made advances to B. & Co., could not retain possession of the seed against the plaintiffs, on the ground, that a factor has no authority to pledge the goods of his principal. *Guichard v. Morgan*, M. 60 G. 3. Page 36

AGREEMENT.

See FIXTURES, 1.

FRAUDS, STATUTE OF, 1.
STAMPS, 2.
USURY, 1.

ALLOTMENT.

See EVIDENCE, 1.

ALTERATION.

See INSURANCE, 1. 2

AMENDMENT,

Of Fines—See tit. FINE.
Of Recoveries—See tit. RECOVERY.

1. If a defendant be arrested by the name of *Elizabeth*, and put in and justify bail in the name of *Betsy*, the bail piece may be amended on payment of costs, and a re-acknowledgment of the bail. *Croft v. Cogg*, M. 60 G. 3. 65

ANNUITY.

See LEGACY DUTY.

LIMITATIONS, STATUTE OF, 1.

1. Where part of the consideration of an annuity consisted of a draft, payable at a banker's:—*Held*, that it was necessary to state in the memorial at what time such draft was payable, and the application for setting aside

ARREST.

the securities, being made twelve years after the execution of the deed, and after the deaths of the attesting witnesses, the Court imposed on the grantors the terms of returning the principal, on taking an account before the prothonotary. *Drake v. Rogers*, E. 1 G. 4. Page 402

APPOINTMENT.

See MARRIAGE SETTLEMENT, 1.

APPROPRIATION OF DEBT.

See PARTNERS, 1.

ARBITRATOR.

See ASSUMPSIT, 1.
AWARD.

ARMY.

See EVIDENCE, 3.

ARREST.

See AMENDMENT, 1.
ATTORNEY, 1.
MISNOMER, 1.

1. If a plaintiff, while attending the execution of a writ of inquiry in an action brought by him in the Court of C. P. against the defendants, who had suffered judgment by default, be arrested by a *quo minus* at the suit of a third person;—the under-sheriff, before whom such inquiry is executed, cannot discharge him, but the Court will do so on motion. *Walters v. Rees*, M. 60 G. 3. 34
2. The defendant was arrested in this Court, after a *non pros* in the *Exchequer*, for the same cause of action:—*Held*, that he was entitled to be discharged on entering a common appearance,

ASSUMPSIT.

623.

as the plaintiff did not shew that the second arrest was vexatious, *Williams v. Thacker*, H. 60 G. 3. and 1 G. 4. Page 294

ASSIGNEE.

See BANKRUPT.
PLEADING, 4.
SHERIFF, 3.
TROVER, 1.
WITNESS, 5.

ASSUMPSIT.

See BANKRUPT, 6.
FRAUDS, STATUTE OF, 1.
LAND TAX, 1.
LIMITATIONS, STATUTE OF, 1.
PLEADING, 4. 5.
RELEASE, 2.
VARIANCE, 2. 3.

1. The plaintiff and defendant entered into a joint and written contract with the owner of a vessel to supply her with colonial produce at *Jamaica*, by a given time. The contract not being complied with, the owner made a demand on the plaintiff alone, who agreed to refer the amount of the damage sustained by such owner to an arbitrator, without the knowledge or consent of the defendant. The arbitrator having awarded a certain sum to be due to the owner, the plaintiff paid the amount, and brought an action for money paid, against the defendant for a moiety thereof: *Held*, that he was entitled to recover. *Burnell v. Minot*, E. 1 G. 4. 340
2. *Quere*, If a defendant undertakes to invest money on a copyhold security, it amounts to a warranty by him that such security shall be valid and sufficient? *Brown v. Howard*, T. 1 G. 4. 506

ATTACHMENT.

See FOREIGN ATTACHMENT.

1. A defendant, on being served with a copy of a *capias*, tore it in pieces, and threw it at the officer:—*Held*, not to amount to a contempt of Court, for which an attachment might be granted. *Myers v. Wills*, H. 60 G. 3. and 1 G. 4. Page 147

ATTORNEY.

See FINE, 5.

PLEADING, 5.

PRACTICE, 3.

RECOVERY, 3.

REPLEVIN, 1.

WITNESS, 3. 4.

1. If a defendant be arrested by an attorney for fees, and a bill of costs be delivered to him without being signed;—he cannot be discharged out of custody on entering a common appearance, as the want of such signature will be a defence to the action on producing the bill at the trial. *Tomlinson v. Clark*, M. 60 G. 3. 4
2. If an attorney be struck off the Rolls of the Court of *King's Bench* for misconduct, this Court will make a like order, on motion, founded on a copy of the original report of the master of K. B. *In re Smith*, H. 60 G. 3. and 1 G. 4. 319
3. If the certificate of an attorney of this Court, be, through the mistake of his agent, filed in the *King's Bench*, where he was not admitted; for four successive years, such certificate may be entered and filed here, on a notice of the fact being given at the stamp office. *Ex parte Jones*, E. 1 G. 4. 347

AVOWBY.

See COSTS, 4.

PLEADING, 2.

AWARD.

See ASSUMPSIT, 1.

STAMPS, 1.

1. Where the plaintiff obtained a verdict, subject to a reference, and the arbitrator died before making his award, and the parties agreed that another should be substituted in his stead, and one of them afterwards objected to such substitution:—The Court refused to interfere, as the death of the arbitrator had the effect of opening the cause, and as execution could not be sued out on the verdict, on account of such death. *Harper v. Abrahams*, M. 60 G. 3. Page 3
2. If arbitrators, having proceeded in a reference, inform the defendant present at the meeting, that they would suspend their proceedings till books of account had been referred to, and they afterwards make an award in his absence, without examining such books:—*Held*, to be a good ground for setting aside the award. *Pepper v. Gorham*, H. 60 G. 3. and 1 G. 4. 143

BAIL.

See AMENDMENT, 1.

JUSTICES OF PEACE, 2.

1. Notice for justifying bail in person, must be served before eleven o'clock in the forenoon of the day, on which, according to the present practice, such notice ought to be served; except where an order of the Court for further time shall have been

BAIL

obtained, in which case it shall be sufficient to serve the notice before three o'clock of the afternoon of the day on which such order shall be granted; and the affidavit of service must specify the time of day at which such notice shall have been served.

Reg. Gen. M. 60 G. 3. Page 2

2. If proceedings on a bail-bond are irregular, or against good faith, it is unnecessary to put in bail before application is made to set them aside. *Secus*, if regular, and the defendant applies to set them aside on terms. *Heath v. Gurley, H. 60 G. 3. and 1 G. 4. 149*

3. In this Court, each of the bail on a recognizance is liable to double the amount of the sum sworn to, although in the *King's Bench* it is otherwise; and this Court will not vary its practice on motion. *Howell v. Wyke, H. 60 G. 3. and 1 G. 4. 167*

BAIL-BOND.

See BAIL, 2.

BANKRUPT, 4.
PRACTICE, 2.

BAIL PIECE.

See AMENDMENT, 1.

BANKRUPT.

See BOND, 1.

PARTNERS, 1.
PLEADING, 4.
SHERIFF, 1—3.
TROVER, 1.
WITNESS, 5.

1. *A.* sold goods to *B.* to be paid for by a bill at two months, and not being able to obtain it from *B.* and doubting his solvency, *A.* employed his broker to re-purchase them in his own name,

BANKRUPT.

525

which was done, although at a great loss. *B.* afterwards became bankrupt, without knowing that the goods had been re-purchased by the broker on account of *A.* In an action of trover, brought by the assignees of *B.* against *A.* for the goods:—*Held*, that they were not entitled to recover, as the transaction was not fraudulent on the part of *A.* *Harris v. Lunell, M. 60 G. 3.*

Page 10

2. A partnership which existed between *A.* and *B.* was dissolved by mutual consent. *A.* being separately possessed of freehold and leasehold estates;—after the dissolution, conveyed them to trustees for sale or mortgage, and empowered them to execute such conveyances as they should think fit, for the purpose of converting his said estates into money, in order to enable him to carry on his trade, and to pay his creditors their debts; and it was agreed that such conveyances might be made and executed by the trustees, with or without the concurrence of *A.*; and that they should be seized or interested in the money arising from such sale or mortgage. When this deed was executed, *A.* had stock in trade, and other personal effects, to a considerable amount, independently of the partnership assets, which were not sufficient to pay the partnership debts. The trustees were not creditors of either *A.* or his partner. *A.* and his partner afterwards gave *C. & Co.*, who were not creditors of either, a power of attorney to make demands of every description, and to examine and settle all the accounts, together with other powers

for them to act, they agreeing to ratify whatever should be done under it. A deed was afterwards prepared by *A.* and his trustees, for the purpose of conveying all *A.*'s freehold and leasehold estates previously conveyed to *D. & Co.* to sell or mortgage, with a view to raise £130,000, and £40,000 in negotiable bills of exchange, and to indemnify the drawers and acceptors from the payment thereof; but these sums were not advanced, not were the bills drawn, or any other act done under the latter deed:—*Held*, that neither the execution of the first conveyance to his trustees, nor power of attorney, under these circumstances, constituted an act of bankruptcy by *A.* *Berney v. Davison*, *H.* 60 *G.* 3. and 1 *G.* 4.

Page 126

3. So, where *A.* and *B.* being in partnership as traders, and in insolvent circumstances, stopped payment on the 15th of February, 1819, and dissolved their partnership on that day. *A.* being separately possessed of freehold and leasehold estates, conveyed the whole of them on the same day, by indentures of lease and release, to trustees in trust for sale or mortgage, for the purpose of converting such estates into money, it being convenient to *A.* to raise money at an early period:—and subsequently to this conveyance, *A.* and *B.* gave a power of attorney to *C. & Co.* to recover all debts which should be due to them, together with full powers for them to act:—*Held*, that these circumstances did not constitute an act of bankruptcy by *A.* *Berney v. Vyner*, *E.* 1 *G.* 4. 322

4. Where, in an action of debt, an assignment of a bail bond was taken, the defendant not having perfected bail, and an action being brought on the bond, he became bankrupt between plea and verdict, and obtained his certificate after final judgment:—*Held*, that he was discharged from the damages and costs of the latter action, as the debt on the bail bond was proveable under the commission. *Dinsdale v. Eames*, *E.* 1 *G.* 4. Page 350

5. Where a commission of bankrupt issued against a trader, describing him as “a dealer in cattle, and seeking his trade of living by buying and selling,” without the words “dealer and chapman;” and at the trial of an action of trespass brought by him against the assignees under the commission, evidence was received of a dealing in hops, and a verdict was found for the defendants, as such assignees, which was afterwards set aside, and a new trial granted, on the ground, that it might operate as a surprise on the plaintiff:—*Held*, on a second trial, that such evidence was properly admitted, as the words “dealer in cattle,” were descriptive of the person only, and that the general statement that the bankrupt got his living by “buying and selling,” was sufficient to admit evidence of any trading whatsoever. *Hale v. Small*, *E.* 1 *G.* 4. 415

6. Goods taken under an execution against *A.* which had been in his possession more than two months before the issuing a commission against him, may be considered as his property, under 49 *Geo.* 3. c. 121. s. 2, and may be describ-

BILLS OF EXCHANGE, &c.

- ed as such in a declaration of *assumpsit* by his assignees, on a guarantie given by the defendants to the bankrupt. *Sampson v. Burton*, T. 1 G. 4. Page 515
7. The Ship Register Acts, 26 Geo. 3. c. 60. and 34 Geo. 3. c. 68, do not tend to repeal or prevent the operation of the statute 21 Jac. 1. c. 19. s. 11. on *British* registered ships:—Therefore, where the owner of a ship assigned his interest in her to J. S. by deed, who became the registered owner, but by his permission, the owner continued to have the ship in his possession, and exercised all acts of ownership over her, until he became bankrupt:—*Held*, that the property in the ship passed to the assignees of such owner, although the register was duly indorsed to J. S. before the act of bankruptcy. *Monkhouse v. Hay*, T. 1 G. 4. 549

BILL.

See ESCAPE, 1.

BILL OF COSTS.

See ATTORNEY, 1.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

See AFFIDAVIT, 1.

BANKRUPT, 1.

STAMPS, 2.

1. J. S. was indebted to the plaintiff for money lent, and being embarrassed, the latter informed him that if he would give security for its repayment, he would procure his creditors to accept a composition. The defendant became surety for J. S. in a joint promissory note, and the transaction was to be kept a secret from the

BOND.

627

other creditors. The plaintiff endeavoured to obtain a composition, but failed:—*Held*, that he could not recover as against the defendant on the note, as the transaction was fraudulent and void in its inception. *Wells v. Girling*, M. 60 G. 3. Page 78

BILL OF LADING.

1. Goods were shipped by the plaintiff in *London*, to be conveyed by the defendant, as ship owner, to *Jamaica*. The goods were there sent on shore according to the custom of the *West India* trade, in a shallop belonging to the defendant's ship, and lost by perils of the sea. The clause of exception in the bill of lading was in the following terms: "the act of God, &c. and all and every other dangers and accidents of the seas, rivers, and navigation of whatever nature and kind soever, save risk of boats, so far as ships are liable thereto, excepted:"—*Held*, that the defendant was not liable for such loss under the bill of lading, as the saving clause only extended to the same risks as if the goods had been on board the ship. *Jokston v. Benson*, M. 60 G. 3. 90

BOAT.

See JUSTICES OF PEACE, 1.

BOND.

See JURY, 2.

REPLEVIN, 1, 2.

TROVER, 1.

1. A bond was executed by an insurance broker, as the principal obligor, and two sureties, with a condition, that if they should

CAPIAS.

pay the obligees certain premiums which should become due for assurances on ships at sea, as should be made with the obligees by the insurance broker, and that within six months after the making the assurances, the bond was to be void. The broker became bankrupt, and was indebted to the obligees in a considerable sum for premiums, and they received a dividend of six shillings in the pound under the commission. The premiums were due three years before the bankruptcy, and the obligees did not call on the sureties until after the bankruptcy:—*Held, first*, that the sureties were not discharged by the laches of the obligees in suffering the credit of the broker to run on so long beyond the six months stipulated by the bond; and *secondly*, that the dividend received by them under the commission, was to be deducted as against the sureties, from the penalty contained in the bond. *London Assurance Company v. Buckle, H. 60 G. 3. and 1 G. 4.*
Page 153

BOTTOMRY BOND.

See TROVER, 1.

BROKER.

See AGENT, 2.
BANKRUPT, 1.
FIXTURES, 1.

BUM BOAT ACT.

See JUSTICES OF PEACE, 1.

CAPIAS.

See PRACTICE, 2.

CONSTABLE.**CERTIFICATE.**

See ATTORNEY, 3.
BANKRUPT, 4.
FOREIGN ATTACHMENT, 1.
RECOVERY, 4.

CERTIORARI.

See PRACTICE, 1.

COMMANDER IN CHIEF.

See EVIDENCE, 3.

COMMISSION OF BANKRUPT.

See BANKRUPT, 5.

COMMITMENT.

See JUSTICES OF PEACE, 2.

COMPOSITION DEED.

See BILLS OF EXCHANGE, 1.

CONCEALMENT.

See AGENT, 1.

CONFIDENTIAL COMMUNICATION.

See WITNESS, 3.

CONSERVATORY.

See FIXTURES, 2.

CONSIDERATION.

See ANNUITY, 1.

CONSTABLE.

1. A constable, who assists a parish officer in levying a distress for poor-rates, under a warrant of magistrates directed to such officer, is not liable to an action of trespass, although a demand was

COSTS.

duly made on such constable in pursuance of the stat. 24 Geo. 2. c. 44. s. 6. *Clarke v. Davey*, E. 1 G. 4. Page 465

CONTEMPT OF COURT.

See ATTACHMENT, 1.

CONTRACT.

See ASSUMPSIT, 1.

FRAUDS, STATUTE OF, 1.

PLEADING, 5.

USURY, 1.

CONVERSION.

See TROVER, 1.

CONVEYANCE.

See ELECTION, 1.

EXECUTION, 1.

CONVICTION.

See JUSTICE OF PEACE, 1.

COPYHOLD.

See ASSUMPSIT, 2.

COSTS.

See ATTORNEY, 1.

FINE, 5.

PRACTICE, 3.

WITNESS, 1.

1. A declaration in trespass, contained four counts for fishing in the plaintiff's several and free fishery, and taking away his fish; pleas, first, not guilty; secondly, that the *locus in quo* belonged to I. S.; and thirdly and fourthly, that the several and free fishery belonged to him. The plaintiff newly assigned, setting out the abutments of his close, and traversed I. S.'s several and free fishery in his replication. Pleas, to the new assignment, first, not guilty; secondly, that the close newly assigned, was the soil of I. S.;

VOL. IV.

CUSTOM OF LONDON. 629

and thirdly, that he had common of fishery over it. The last issue was found for the defendant, as well as that part of the first issue which related to the second, third, and fourth counts of the declaration. All the other issues were found for the plaintiff, with 1s. damages, and 40s. costs on the first count:—*Held*, that the defendant was entitled to the general costs of the action, deducting only the costs of such issues as were found for the plaintiff, on the ground, that the whole cause of action had been substantially found for the defendant on the last issue. *Benett v. Coster*, M. 60 G. 3. Page 110

2. A defendant in replevin residing abroad, must give security for costs. *Selby v. Crutchley*, H. 60 G. 3. and 1 G. 4. 280
3. So, a plaintiff, resident in *Ireland*, is bound to give security for costs, although he may sometimes come over and sojourn in this country. *Mahon v. Martinez*, E. 1 G. 4. 356
4. By 43 Eliz. c. 2. s. 19. a defendant in replevin is entitled to recover treble damages, with his costs also:—*Held*, that parish officers avowing on a distress for poor rates under that statute, are only entitled to single costs. *Butterton v. Furbur*, H. 60 G. 3. and 1 G. 4. 296

COUNTY COURT.

See REPLEVIN, 2.

COVENANT.

See PLEADING, 2.

VARIANCE, 1.

CUSTOM OF LONDON.

See FOREIGN ATTACHMENT.

T T

DEVIATION.**DAMAGES.**

See ACTION ON THE CASE, 1.

COSTS, 4.

GUARANTIE, 1.

DEBTOR AND CREDITOR.

See BILLS OF EXCHANGE, 1.

DECLARATION.

See EJECTMENT,

PLEADING, 1.

REPLEVIN, 2.

DEED.

See BANKRUPT, 2—7.

EXECUTION, 1.

PRACTICE, 1.

PRISONER, 1.

VARIANCE, 1.

WITNESS, 3.

1. In the construction of a deed, regard must be had to all its parts, and general words are to be restrained by a particular recital contained therein; and if a deed operate two ways, the one consistent with the intent of the party, and the other repugnant to it, the Court will put such a construction on it as to give effect to such intent, which is to be derived from the whole of the instrument. *Solly v. Forbes, E. 1 G. 4.* Page 448

DEMURRER.

See PLEADING, 1—5.

RELEASE, 2.

DEPARTURE.

See RELEASE, 2.

DEPOSITION.

See WITNESS, 4.

DEVIATION.

See INSURANCE, 4.

EJECTMENT.**DEVISE.**

See ELECTION, 1.

MARRIAGE SETTLEMENT, 1.

1. Devise of all the devisor's messuages, lands, and tenements, freehold and copyhold, to trustees "to the use of his daughter for life, and after her decease to the use of her issue; and in default of issue, or in case none of such issue live to attain the age of twenty-one years," then over:—*Held*, that the daughter took the beneficial interest in the premises, for her life only. *Meret v. James, E. 1 G. 4.* Page 327

DISTRESS.

See CONSTABLE, 1.

COSTS, 4.

LANDLORD AND TENANT, 1.

PLEADING, 3.

REPLEVIN.

TIME, COMPUTATION OF, 1.

EAST INDIA COMPANY.

See WITNESS, 2.

EJECTMENT.

1. An affidavit of service of a copy of the declaration and notice in ejectment, on the son of the tenant in possession, and that such tenant acknowledged that he had received the same, is not sufficient, as it must state that such acknowledgment was made before the essoign day. *Dee, d. Macdougall v. Roe, M. 60 G. 3.* 20
2. The affidavit on which to move for judgment against a casual ejector, in the case of a vacant possession, where one copy of the declaration was sworn to have been fixed on the premises, and another served on the lessee, but not on the premises, it

ELECTION.

is necessary to state that such lessee was tenant in possession at the time of the service. *Doe, d. Seabrook v. Roe, E. 1 G. 4.*

Page 350

3. In ejectment, if one part of the premises be vacant, and the other in the occupation of a tenant, it is sufficient for an affidavit to ground a motion for judgment against the casual ejector, to state, that a copy of the declaration was served on the tenant who occupied the one part, and that another copy was affixed on the door of that part which was vacant. *Doe, d. Evans v. Roe, T. 1 G. 4.* 469

ELECTION.

1. By a marriage settlement, lands were limited to the use of the settlor for life, remainder to his first and other sons in tail male, with reversion to the settlor in fee. A son, the issue of the marriage, devised the same lands to his father (the settlor) for life, with remainder to his two sisters of the half blood in fee, and died without issue in the life-time of the settlor, who accepted certain benefits under the will, and afterwards devised the estate, after the respective deaths of his daughters without issue male, (which event took place) to A. for life, with divers remainders over; under which latter will the plaintiff claimed to be entitled. On the part of the defendant, it was contended, that the son having by will taken upon himself to devise the estate to his father (the settlor) for life, with remainder to his sisters in fee, and that the father having accepted certain benefits, devised to him by the said will of his

ESCAPE.

631

son, had thereby elected to confirm the will, and by such acceptance and election, had either divested himself of the reversion limited to himself by the original settlement, or was estopped from setting up that settlement, or controverting the right of his son to dispose of the fee to his two sisters; and further, that the father having admitted an agreement by him to convey the estate immediately to his son, in consideration of the payment of a certain sum, and an annuity to the father, with a proviso that if the son died in the life-time of the father, the conveyance was to be wholly void: the Jury should have been directed to presume some conveyance enabling the son to dispose of the fee by his will:—*Held*, however, that the sisters took no estate under the will of their brother, it being clearly the intention of the settlor to avoid the alleged conveyance in the event which had happened, and the Court would rather presume such a conveyance as was consistent with that intention, and which might have operated under the statute of uses, by re-vesting the use in the father, in the event contemplated, without the necessity of any entry. *Halford v. Dillon, E. 1 G. 4.*

Page 361

ESCAPE.

1. A bill may be filed against the Warden of the *Fleet*, for an escape, on the day after the essoign day, entitled as of the Term generally, and if the plaintiff give a rule to plead on the first day the Court sits, he will comply with the requisition of the statute 8 & 9 W. 3. c. 27. s. 12.,

provided he do not sign judgment within eleven days after the filing of the bill. *Bolton v. Eyles*, E. 1 G. 4. Page 425

ESSOIGN.

See EJECTMENT, 1.

WARRANT OF ATTORNEY, 1.

1. The interval between the essoign day, and the first day of the Court's actually sitting, must be taken as part of the Term. *Bolton v. Eyles*, E. 1 G. 4. 425

ESTATE FOR LIFE.

See DEVISE, 1.

EVIDENCE.

See BANKRUPT, 5.

ELECTION, 1.

FRAUDS, STATUTE OF, 1.

JUSTICE OF PEACE, 1.

STAMPS, 1.

VARIANCE.

WITNESS, 5.

1. By an inclosure act, referees were appointed to ascertain the average price of corn in the week after the close of *Easter* next, after the expiration of fourteen years after the division and allotments under the inclosure should be finished, and the exact amount of a yearly corn-rent, in lieu of tithes, was to be declared by an order of the Quarter Sessions. The referees delivered their report into the Court of Quarter Sessions, who ordered it to be filed:—*Held*, that the Commissioners under the act having minutes of their proceedings in writing, no parol evidence could be admitted, to shew when the division and allotments were made and completed, as such minutes were

EXECUTION.

neither produced, nor proved to have been destroyed. *Bendyshe v. Pearce*, M. 60 G. 3. Page 99

2. Letters of a party under whom a plaintiff in replevin does not claim, are inadmissible in evidence to affect the title of the latter. *Halford v. Dillon*, E. 1 G. 4. 381
3. Where the Commander in Chief directed a military inquiry to be held, to investigate the conduct of a commissioned officer in the army, who afterwards sued the President of such Court of Inquiry, for a libel, stated to be contained in his report, and transmitted by him to the Commander in Chief:—*Held*, that such report was a privileged communication, and properly rejected as evidence at the trial, and that an office copy thereof was inadmissible. *Home v. Bertinck*, T. 1 G. 4. 563

EXAMINATION OF WITNESSES.

See WITNESS, 2. 4.

EXECUTION.

See AWARD, 1.

BANKRUPT, 6.

FOREIGN ATTACHMENT, 1.

PLEADING, 4.

SHERIFF, 1. 2.

1. *A.* being seised in fee of a close, on which a windmill was erected, mortgaged the close to *B.* for 1000 years, and in the same deed there was a conveyance by bargain and sale of the mill to him in fee. The mill was built of wood, removeable at pleasure, and fixed to brick work, which was let into the ground:—*Held*, that the mill could not be taken in execution under a *fiery facias*, sued out against *A.* by one of

FINE.

his creditors, although *A.* had continued in possession, and carried on his trade therein. *Steward v. Lombe*, *H. 60 G. 3.* and *1 G. 4.* Page 281

EXECUTOR.

See LEGACY DUTY, 1.
PLEADING, 3.

FACTOR.

See AGENT, 2.

FIERI FACIAS.

See EXECUTION, 1.
PLEADING, 1.
SHERIFF, 3.

FINE.

1. No motion can be made at the bar on the last day of any Term, touching the amendment of any fine or recovery, or any of the proceedings therein. *Reg. Gen. H. 60 G. 3.* and *1 G. 4.* 320
2. The affidavit of taking an acknowledgment of a fine in a foreign country, must be engrossed on parchment. *Palmer*, Plaintiff; *Morgan*, Deforciant. *H. 60 G. 3.* and *1 G. 4.* 162
3. If, in taking the acknowledgment of a fine abroad, a schedule be referred to on the back of the *dedimus*, as being annexed, such schedule must be signed by the Commissioners. *Graham*, Plaintiff; —, Deforciant. *H. 60 G. 3.* and *1 G. 4.* 295
4. A fine may be amended in which tithes were described as arising out of a rectory, by describing them as arising out of a borough and parish, in conformity to the deed to lead the uses.

FIXTURES.

633

Collins, Plaintiff; *Brown*, Deforciant, *H. 60 G. 3.* and *1 G. 4.*

Page 170

5. In a fine, if one parish be inserted instead of two, by mere mistake of the attorney, the costs of the amendment must be paid by him. *Williamson*, Demandant, *Meggison*, Tenant, *Beaumont*, Vouchee. *H. 60 G. 3.* and *1 G. 4.* 171

FISHERY.

See COSTS, 1.

FIXTURES.

1. The defendant agreed verbally with the plaintiff to take a house and purchase the fixtures at a valuation to be made by two brokers. An inventory of the furniture and fixtures was accordingly made, described generally as "an inventory of the fixtures, &c." with the gross amount placed at the foot thereof. In an action for goods sold and delivered, with a count on an account stated:—*Held*, that the defendant having taken possession of, and enjoyed the furniture and fixtures, and paid part of the sum determined by the brokers, to be due for the same, he was liable on the account stated for the remainder, and could not afterwards object to the plaintiff's defective title to the house. *Salmon v. Watson*, *M. 60 G. 3.* 73
2. A conservatory erected on a brick foundation affixed to and communicating with rooms in a dwelling-house, by windows and doors, cannot be removed by a tenant for years, who had erected it during his tenancy, although he had a reversion in fee after the death of his lessor. *Buckland v. Butterfield*, *E. 1 G. 4.* 440

FOREIGN ATTACHMENT.

1. The plaintiffs, being foreign merchants, had a sum of money belonging to them in the hands of the defendants. The plaintiffs also dealt with *R. & Co.* who resided abroad, and were indebted to them in a sum exceeding the debt due from the defendants to the plaintiffs. *R. & Co.* attached money in the hands of the defendants, according to the custom of *London*, as being the money of the plaintiffs. The attachment was tried, and a verdict recovered against the defendants, as garnishees. Judgment was obtained, and a certificate granted by the officer of the Court, informing the defendants that judgment had been entered. On the production of the certificate by *R. & Co.* the defendants, as garnishees, paid the amount of the verdict, by debiting the plaintiffs in the defendant's books of account, and crediting *R. & Co.* therewith, under an engagement that the money should be returned if the proceeding failed. The plaintiffs afterwards appeared to the action in the Mayor's Court, and put in bail, by which the attachment was dissolved:—*Held*, first, that this was not a compulsory payment, as by the custom it was not required to be made until after execution executed; and secondly, that the transfer made by the defendants in their books of account did not amount to payment, unless the plaintiffs had directed it to be done, or had subsequently assented to it. *Wetter v. Rucker*, *H. 60 G. 3.* and *1 G. 4.*

Page 172

FRAUD.

See BANKRUPT, 1.

BILLS OF EXCHANGE, 1.

LIMITATIONS, STATUTE OF, 1.
RELEASE, 1.

FRAUDS, STATUTE OF.

1. In *assumpsit* for goods sold, and on an account stated, to recover the value of growing poles purchased from the plaintiff by the defendants, and afterwards carried away by them; it appeared in evidence, that at the time of the bargain some memorandums in writing had been made, but which were neither stamped nor signed by the parties. It was also proved, that the defendants, after the poles were carried away, admitted that a balance was due to the plaintiff; under these circumstances the plaintiff was nonsuited:—*Held*, that such nonsuit was proper, as it was not proved that the defendants had admitted a precise and definite sum to be due to the plaintiff, and therefore that he could not recover on the account stated, without reference to the memorandums, which were not admissible in evidence, but as the contract had been executed by the defendants, they having carried away the poles, the Court granted the plaintiff a new trial on payment of costs. *Teall v. Auty*, *T. 1 G. 4.* Page 542

FRAUDULENT CONVEY-
ANCE.

See BANKRUPT, 2—3.

GAME.

1. A servant of a qualified person assisted his master in setting a trap on his land for taking rabbits and vermin, and he ordered such ser-

HEIR.

vant, if a hare should be caught to bring it to him. A hare being afterwards caught in the trap, in the absence of the master, it was accordingly killed, and carried to him by such servant:—*Held*, that he was not liable to the penalties for using snares for the destruction of game, or having it in his possession, so as to constitute an exposure to sale under the statute 9 Anne, c. 25. s. 2. *Walker v. Mills*, E. 1 G. 4. Page 343

GARNISHEE.

See FOREIGN ATTACHMENT, 1.

GOODS SOLD AND DELIVERED.

See FIXTURES, 1.

FRAUDS, STATUTE OF, 1.

GUARANTIE.

See BANKRUPT, 6.

PLEADING, 4.

VARIANCE, 3.

1. A guarantie is merely a contract to indemnify upon a contingency, and being in the nature of a claim for unliquidated damages, it cannot form the subject of a mutual credit, under 5 Geo. 2. c. 30. s. 28. *Sampson v. Burton*, T. 1 G. 4. 515

HABEAS CORPUS.

1. The Court will grant a *habeas corpus* in the first instance, to bring up an infant, who had absconded from his father, and was detained by a third person without his consent. In *re Pearson*, E. 1 G. 4. 366

HEIR.

See MARRIAGE SETTLEMENT, 1.
PLEADING, 5.

INFERIOR COURT. 635

HUSBAND AND WIFE.

See RECOVERY, 1.

VARIANCE, 1.

HYPOTHECATION.

See TROVER, 1.

INCLOSURE ACT.

1. By an inclosure act, referees were appointed to ascertain the average price of corn in the week after the close of *Easter* next after the expiration of fourteen years after the division and allotments under the inclosure should be finished, and the exact amount of a yearly corn rent, in lieu of tithes, was to be declared by an order of the Quarter Sessions. The referees delivered their report into the Court of Quarter Sessions, who ordered it to be filed:—*Held*, that this was not an order as required by the act, declaring the exact amount of the yearly corn rent, in the manner therein directed. The allotments were made and finished in *September*, 1799, and the Commissioners made their award on the 20th of *October*, 1800, and application was made at the *Easter* Sessions, 1814. *Quare*, whether this was premature within the meaning of the act? *Bendyshe v. Pearce*, M. 60 G. 3. Page 99

INDEMNITY.

See VARIANCE, 3.

INDENTURE.

See PLEADING, 2.

INFANT.

See HABEAS CORPUS, 1.

INFERIOR COURT.

See PRACTICE, 1.

INITIALS.

See PRACTICE, 2.

INQUIRY, WRIT OF.

See ARREST, 1.

EVIDENCE, 3.

REPLEVIN, 2.

INSTALMENT.

See USURY, 1.

INSURANCE.

See AGENT, 1.

1. A policy of insurance was effected on a ship from *Liverpool* to *Africa*, and during her stay there, and from thence back to *Liverpool*, with liberty to proceed to, and stay at any ports of discharge and loading in *Africa*, to sell, barter, and exchange goods, and load, unload, and reload goods, at all or any of the ports she might call at and proceed to. After the execution of the policy, the assured inserted the words "*sell, barter, and exchange goods*," as well as the words "*and trade*," after those of "*during her stay*," and which were acquiesced in by several of the underwriters:—*Held*, that the alteration was unimportant, and therefore did not avoid the policy against an underwriter, who had subscribed his initials to the words "*sell, barter, and exchange goods*," but had not assented to the insertion of the words "*and trade*," although his initials were subscribed to them. *Sanderson v. M' Cullom*, *M. 60 G. 3. Page 5*
2. So, where a vessel was insured from *Liverpool* to *Africa*, and during "*her stay there*," and back, with liberty to sell, barter, exchange, load, and reload goods:—and after the exe-

- cution of the policy, the assured inserted the words "*and trade*" in the risk, without the consent of the defendant, (an underwriter), although others had assented thereto:—*Held*, an immaterial alteration, as the ship had liberty to trade without the introduction of those words. *Sanderson v. Symons*, *M. 60 G. 3. Page 42*
3. A vessel, with a cargo on board, took the ground on two successive days in going up *Cork* harbour, under the direction of a pilot, and being afterwards moored in the usual course, was thrown on her broadside by the receding of the tide, and received a considerable injury:—*Held*, that this was not a stranding within the meaning of that term in a policy of insurance. *Hearn v. Edmunds*, *M. 60 G. 3. 15*
 4. On a policy at and from *London* to *New South Wales*, and from thence to the ship's loading port or ports in the *East Indies* and elsewhere, and that she might proceed and sail to, and touch and stay at, any ports or places whatsoever and wheresoever, and for any purpose whatsoever:—The ship went from *London* with convicts to *New South Wales*, where, having discharged them, she proceeded in ballast, to *Batavia*, where she took on board a quantity of iron, and discharged the same at *Sourabaya*, and was there loaded with a full cargo of rice; with which she proceeded to the *Mauritius*, where it was discovered that she had sustained an injury, and she was accordingly broken up:—*Held*, to be no deviation; although it was insisted, that by the terms of the policy the ship was only warranted to go to her loading ports,

JUSTICE OF PEACE.

and not to trade or take in a fresh cargo. *Armet v. Innes*, H. 60 G. 3. and 1 G. 4. Page 150

INSURANCE BROKER.

See BOND, 1.

INTEREST OF MONEY.

See STAMPS, 1.

USURY, 1.

IRREGULARITY, WAIVER OF.

See PRACTICE, 2.

JURISDICTION.

See JUSTICE OF PEACE.

JURY.

1. The Court will not discharge a rule obtained by a defendant for a Special Jury, where no delay appears, nor will it be presumed to have been obtained for delay, although the defendant acknowledged the debt, and it was sworn that it was believed he had no defence to the action. *Briggs v. Dixon*, E. 1 G. 4. 414
2. So, where, in an action on a bond, the defendant, after plea, had admitted the debt, but obtained a rule for a Special Jury, the Court would not order the cause to be tried within the Term, unless the plaintiff shew whether it was a fit cause to be tried by a Special Jury or not. *Tripp v. Patmore*, T. 1 G. 4. 470

JUSTICE OF PEACE.

See CONSTABLE, 1.

1. Where a Justice of the Peace has jurisdiction, his conviction is conclusive evidence of the facts stated therein, if no defect appear on the face of it. Therefore,

LAND TAX.

637

where in an action of trespass against two Justices, for seizing and detaining a decked and registered vessel on the *Thames*, having gunpowder on board, under the Bum Boat Act, 2 Geo. 3. c. 28:—*Held*, that the owner could not be let into evidence, to shew, that she was not a boat within the meaning of that statute. *Brittain v. Kinnaird*, M. 60 G. 3. Page 50

2. A Justice of the Peace out of sessions, before information filed, or indictment found, has jurisdiction in the first instance to issue his warrant to apprehend a party charged on oath with publishing a libel, and require him to find bail, and in default of sureties to commit him to prison to abide his trial. *Butt v. Conant*, H. 60 G. 3. and 1 G. 4. 195

JUSTIFICATION OF BAIL.

See BAIL, 1.

LANDLORD AND TENANT.

See EJECTMENT.

FIXTURES.

LAND TAX.

PLEADING, 2.

REPLEVIN.

SHERIFF, 2.

LAND TAX.

1. Where the tenant of premises under a lease which contained no reservation as to the payment of land tax, claimed a deduction for such tax, which was refused by the landlord, who afterwards distrained, and was paid the whole rent, and the tenant afterwards paid his full rent for five successive years, without claiming to deduct such tax:—*Held*, that such acquiescence was equi-

LEGACY DUTY.

valent to a dereliction of his claim in the first instance, and that he could not recover back any of the sums so paid by him for land tax, in an action of *assumpsit*, for money paid, on the ground of their being involuntary payments. *Spragg v. Hammond*, *E. 1 G. 4.* Page 431

LEASE.

See LAND TAX.
PLEADING, 2.
VARIANCE, 1.

LEGACY DUTY.

1. By the statute 36 G. 3. c. 52. s. 6. the legacy duty must be paid by an executor or administrator, and if not, it shall become their debt; and that in case they shall pay the legacy without deducting the duty, it shall become a debt to the Crown from both the executor and legatee; and, by the eighth section of that statute, the duty chargeable on legacies, given by way of annuity, must be paid by four equal payments, the first on or before the completing the first year's annuity, and the three others in like manner successively, before or on completing the payments of the three succeeding years respectively:—*Held*, that executors under a will, who paid the legacy duty on an annuity eight years after the death of the testator, might recover the amount from the legatee, in an action for money paid, although such legatee had assigned the annuity three years before,—on the ground, that the payment by the executors was compulsory, and that they stood in the situation of

MANDAMUS.

trustees or sureties to the legatee. *Hales, (Bart.) v. Freeman*, *M. 60 G. 3.* Page 21

LETTER.

See EVIDENCE, 2.
STAMPS, 2.

LIBEL

See EVIDENCE, 3.
JUSTICE OF PEACE, 2.

LIMITATIONS, STATUTE OF.

1. Where the plaintiff, in a declaration of *assumpsit*, stated that he employed the defendant to invest and lay out the plaintiff's money in an annuity, on a good and sufficient security, which he promised to do, and assigned for breach, that he laid it out on an invalid and fraudulent security: *Held*, that the statute of limitations was a good bar to the plaintiff's recovery, as the promise of the defendant was the gist of the action, although it was commenced within the period of six years from the time it was discovered that the annuity was invalid, and the defendant knew it to be so at the time the annuity was granted. *Semb*, that in cases of fraud the statute of limitations only runs from the time the fraud is discovered. *Brown v. Howard*, *T. 1 G. 4.* 608

LIMITATION OF ESTATE.

See ELECTION, 1.
MARRIAGE SETTLEMENT, 1.

MAGISTRATE.

See JUSTICE OF PEACE.

MANDAMUS.

See WITNESS, 2.

MARRIAGE SETTLEMENT.

See ELECTION, 1.

1. A. by his marriage settlement, after giving himself and wife estates for life, with a power of appointment, limited, in default of such appointment, as follows: "to the use of the children of the marriage, sons and daughters, equally, as tenants in common, and to the heirs of such children lawfully issuing; and that in case there should be more children than one of the marriage, and any such child or children should happen to die under the age of twenty-one years without issue, then as to the parts and shares of all and every such child and children so dying, to the use of the surviving children, as tenants in common, and to the heirs of the body of every such child and children, until they should be dead; and in case there should be but one child only of the marriage, or one only surviving child, then to the use of such surviving child, and the heirs of the body of such surviving child; and for default of such issue, or in case there should be issue of the marriage, who should all die without issue, under the age of twenty-one years, then to the use of the heirs and assigns of the survivor of A. and his wife for ever." A. having married, died intestate, leaving his widow and two children him surviving. The widow devised the property to her mother for life, and after her decease to J. S. in fee, provided her children should die before twenty-one without issue. She then died, leaving both children surviving, who afterwards became of age. One, a daughter, married one of the defendants; the

MONEY PAID. 680

other a son, died shortly afterwards, leaving his estates by will to his sister in fee:—*Held*, that on the death of the brother, the sister, who was already tenant in tail in possession of one moiety of the lands comprised in the marriage settlement, became as heir at law of her mother, tenant in fee in reversion of that moiety, and tenant in fee in possession of the other moiety. *Levin v. Weatherall*, H. 60 G. 3. and 1 G. 4. Page 116

MASTER AND SERVANT.

See ACTION ON THE CASE, 1.
GAME, 1.

MAYOR'S COURT.

See FOREIGN ATTACHMENT, 1.

MEMORANDA.

1. 115. 321.

MEMORIAL.

See ANNUITY, 1.

MILITARY INQUIRY.

See EVIDENCE, 3.

MISNOMER.

1. The misnomer of a plaintiff in a writ under which the defendant is arrested, can only be taken advantage of by plea in abatement. *Morley v. Law*, E. 1 G. 4. 369

MONEY LENT.

See BILLS OF EXCHANGE, 1.

MONEY PAID.

See ASSUMPSIT, 1.
LAND TAX, 1.
LEGACY DUTY, 1.

OYER.**MONTH.***See* RELEASE, 2.

TIME, COMPUTATION OF.

MORTGAGE.*See* BANKRUPT, 2.

EXECUTION, 1.

SHERIFF, 2.

MUTUAL CREDIT.*See* GUARANTEE, 1.**NEW ASSIGNMENT.***See* COSTS, 1.**NEW TRIAL.***See* BANKRUPT, 5.

FRAUDS, STATUTE OF, 1.

NOLLE PROSEQUI.*See* ARREST, 2.**NONSUIT.***See* FRAUDS, STATUTE OF, 1.**NOTICE.***See* BAIL, 1.

EJECTMENT.

OFFICER.*See* ATTACHMENT.

CONSTABLE.

COSTS, 4.

EVIDENCE, 3.

ORDER FOR PAYMENT OF MONEY.*See* STAMPS, 2.**OYER.***See* RELEASE, 2.**PENALTY.****PAROCHMENT.***See* RECOVERY, 5.**PARENT AND CHILD.***See* HABEAS CORPUS, 1.**PARTNERS.***See* BANKRUPT, 2-3.

RELEASE, 1.

REPLEVIN, 1.

WITNESS, 5.

1. Where the plaintiff kept a general account with A., as his banker and army agent, and B. became a partner with A. for a limited period, and retired on its expiration, without the knowledge of the plaintiff, and A. afterwards became bankrupt, until which period the account continued between the plaintiff and A. :—*Held*, that payments made by the latter to the plaintiff after the expiration of the partnership, not having been appropriated by him at the time to any particular debt, B. might consider such payments as being made in reduction of the balance due at the expiration of the partnership, and that he was not accountable to the plaintiff for any sums received by A. on account of the latter, subsequent to such expiration. *Brooke v. Enderby*, T. 1 G. 4. Page 501

PAYMENT.*See* FOREIGN ATTACHMENT, 1.

PARTNERS, 1.

SHERIFF, 3.

USURY, 1.

PENALTY.*See* BOND, 1.

GAME, 1.

STAMPS, 2.

PILOT.

PERILS OF THE SEA.

See BILLS OF LADING.

PILOT.

See INSURANCE, 3.

PLEADING.

See BANKRUPT, 6.

COSTS, 1.

LIMITATIONS, STATUTE OF, 1.

1. To a declaration in *scire facias* on a judgment in replevin, damages \$473. 13s. 4d., the defendant pleaded, that before the suing out the *scire facias*, the plaintiff sued out a *fiery facias*, commanding the sheriff to levy \$274. 13s. 4d.; and which writ was delivered to the sheriff, who, before the return thereof, seised and took in execution goods of the defendant, to the value of £37. 13s.—*Held*, that such plea was bad, as it did not state that the sheriff had returned the writ. It seems also, that such plea afforded no answer to the whole of the declaration, as the sum levied was only sufficient to satisfy part of the judgment, and that it was therefore bad on special demurrer. *Peplow v. Galhies*, H. 60 G. 3. and 1 G. 4. Page 163

2. In covenant for non-payment of rent, on an indenture, by the assignees of the lessor against lessee, the declaration alleged, that the lessor was possessed for the remainder of a term of twenty-two years, commencing from the 25th of December, 1797, and that on, the 7th of March, 1811, he, by indenture, demised to the defendant, to hold from the 20th of December then last

PLEADING. 641

past. Plea, that the lessor was not at the time of making the indenture, possessed for the residue of the said term *modo et forma*:—*Held*, that such plea was good on general demurrer, as the averment in the declaration was material and traversable. *Carvick v. Biagrove*, H. 60 G. 3. and 1 G. 4. Page 303

3. To an avowry by executors for rent due in the life-time of their testator, a plea in bar that the testator took as a distress for the same rent, goods of sufficient value to satisfy such rent, and the costs of taking the distress, is insufficient, as it should have shown that such distress produced a satisfaction of the rent. *Lingham v. Warren*, E. 1 G. 4. 409

4. Goods taken under an execution against A. which had been in his possession more than two months before the issuing a commission against him, may be considered as his property, under 49 G. 3. c. 121. s. 2, and may be described as such in a declaration of *assumpsit* by his assignees, on a guarantee given by the defendant to the bankrupt. *Sampson v. Burton*, T. 1 G. 4. 515

5. Where the plaintiff as administrator, declared in *assumpsit* that the intestate had retained the defendant as his attorney, to investigate and procure a good title of an estate about to be conveyed to the intestate as purchaser, and assigned for breach that he did not do so, but accepted a bad and defective title in the life-time of the latter, whereby his personal estate was much injured: *Held*, on demurrer to the decla-

642 POWER OF ATTORNEY. PREMIUMS OF INSURANCE.

ration, that the action was well brought, although it was objected, first, that though it was framed in contract, it was in substance a *tort*, arising from a neglect of duty by the defendant; secondly, that the heir should have sued, and not the administrator, as it was a contract which ran with the land; and lastly, that it was not alleged in the declaration, that the defendant undertook to ascertain and procure a good title in his professional character as an attorney;—for, by the demurrer, the defendant admitted the promise to the intestate, as well as the allegation that the injury accrued to his personal estate during his lifetime, and it must be implied that he was bound to fulfil his duty as an attorney, it being alleged that the intestate employed him as such. *Knights v. Quarles*, T. 1 G. 4. Page 532

PLEDGE.

See WITNESS, 5.

POLICY OF INSURANCE.

See AGENT, 1.
INSURANCE.

POOR RATE.

See CONSTABLE.
COSTS, 4.
TIME, COMPUTATION OF, 1.

POWER OF APPOINTMENT.

See MARRIAGE SETTLEMENT, 1.

POWER OF ATTORNEY.

See BANKRUPT, 2—3.

PRACTICE.

See AFFIDAVIT.

ARREST.

ATTACHMENT.

ATTORNEY.

BAIL.

EJECTMENT.

ESCAPE, 1.

FINE.

JURY.

PRISONER.

RELEASE, 1.

REFLEVIN, 2.

VARIANCE.

WARRANT OF ATTORNEY.

1. On the removal of a cause from an inferior Court, by a writ of *certiorari*, the plaintiff need not file his declaration until the end of the Term after that in which the writ is returnable. *Watson v. Eagle*, H. 60 G. 3. and 1 G. 4. Page 190
2. By a writ of *capias ad respondendum*, the sheriff was directed to take *Messrs. C. & D.* without mentioning their christian names. They afterwards signed a bail-bond in their christian and surnames, which was duly executed: *Held*, a waiver of the irregularity in the writ. *Kingston v. Llewellyn*, H. 60 G. 3. and 1 G. 4. 317
3. Where process appeared to be sued out in the name of *A.* by *B.* neither of whom were attorneys of this Court, and *B.* had no authority of any other attorney to act in his name, the Court set aside the proceedings, and ordered *A.* and *B.* to pay costs. *Hawkins v. Edwards*, T. 1 G. 4. 603

PREMIUMS OF INSURANCE.

See BOND, 1.

RECOGNIZANCE.

PRINCIPAL AND AGENT.

See AGENT.

PRISONER.

1. Where a defendant in custody had been charged with a declaration, as of *Trinity Term*, and absconded during the long vacation, but did not return into custody until *Hilary Term* following, the Court refused to discharge him, although the plaintiff had not signed judgment before the end of such *Hilary Term*. *Grimes v. Joseph, E.* 1 G. 4. Page 380

PROCESS.

See ATTACHMENT.
EJECTMENT.
PRACTICE.

PROMISSORY NOTE.

See BILLS OF EXCHANGE.
STAMPS, 1.
USURY, 1.

PROMOTIONS.

See MEMORANDA.

QUARTER SESSIONS.

See EVIDENCE, 1.

QUO MINUS.

See ARREST, 1.

RECOGNIZANCE.

See BAIL, 3.

RECOVERY.

1. No motion can be made as to the passing or amendment of fines or recoveries on the last day of Term. *Reg. Gen. H.* 60 G. 3. and 1 G. 4. 320

RECOVERY.

643

2. A recovery may be amended by substituting the words "perpetual advowsons," for those of "tithes to rectories belonging," &c. if the words "perpetual advowsons" only, are inserted in the deed to lead the uses. *Williamson, Demandant; Meggison, Tenant; Beaumont, Vouchee. M.* 60 G. 3. Page 49
3. An affidavit of a Commissioner, that the wife of a vouchee was examined separately from her husband, cannot be received or filed, if it was not made at the time the acknowledgment was taken. *Breach, Demandant; Hewitt, Tenant; Brierley, Vouchee. M.* 60 G. 3. 113
4. If there be several palpable mistakes in a recovery, through the neglect of the attorney employed to perfect it, the Court will order him to pay the costs of its amendment. *Williamson, Demandant; Meggison, Tenant; Beaumont, Vouchee. H.* 60 G. 3. and 1 G. 4. 171
5. A warrant of attorney in a recovery was taken and acknowledged before two Commissioners at *Cape Town*. The usual affidavit of caption and acknowledgment was sworn by one of them, before the Deputy Fiscal there. Endorsed on the affidavit was a certificate of a notary, that the Commissioner who had made it was sworn in his presence, on the day of (omitting the dates of the day and month), and at the end of the certificate the notary had put the date, which was the same as the jurat of the affidavit:—*Held*, that the recovery might pass, notwithstanding such omission. *Hinde, Demandant; Hinde, Tenant; Bland, Vouchee. E.* 1 G. 4. 348

6. The necessary documents for taking the acknowledgment of a recovery in *Holland*, were engrossed on parchment, and sent to Commissioners there. By the law of that country, all documents bearing the certificate of a *Dutch* notary, require a *Dutch* stamp, which can only be imprinted on paper. The documents were accordingly returned, written on paper, so stamped, and certified:—*Held*, that the acknowledgment and proceedings so written on paper, could not be allowed; but the Court enlarged the return to the *dedimus*, and permitted the writ to be resealed, in order to endeavour to get the documents properly executed on parchment, and returned during the Term, which was accordingly done, when the recovery was permitted to pass in the usual way. *Tatham*, Demandant; *Bazendale*, Tenant; *Tabor*, Vouchee. *T. 1 G. 4. Page 481*

7. The writ of entry in a recovery may be amended, by altering the name of the demandant, and transposing that of the tenant, on an affidavit that all the parties interested were living, and assented to the amendment. *Edge*, Demandant; *Taylor*, Tenant; *Warren*, Vouchee. *T. 1 G. 4. 544*

8. The Court refused to allow the amendment of two recoveries, the one suffered in the reign of *Will. & Mary*, and the other in *Geo. 1.* by the insertion of the word "tithes" it not appearing that the parties were in possession of such tithes at the time the recoveries were suffered, although the word "hereditaments" was contained in the deed to lead the uses.—*Phillips*, Demandant; *Nowne*, Tenant; *Lisle*, Vouchee.—*Phillips*, Demandant;

Whittaker, Tenant; *Lisle*, Vouchee, *T. 1 G. 4. Page 604*

REFERENCE.

See AWARD.

REGISTER.

See BANKRUPT, 7.
JUSTICE OF PEACE, 1.
SHIP.
TROVER, 1.

REGULÆ GENERALES.

2. 320.

RELEASE.

1. If one of two plaintiffs release a defendant after action brought, without the consent of the other, the Court will not set aside such release, unless fraud be clearly established. *Arton v. Booth*, *H. 60 G. 3. and 1 G. 4. 192*
2. A release must be construed according to the particular purpose and intent for which it was made, as where *A.* and *B.* being in partnership, and in insolvent circumstances, *A.* alone gave a general release by deed to the plaintiffs, to whom himself and *B.* were jointly indebted, with provisions that it should not operate to release or prejudice any demands which the plaintiffs had against *B.*, either separately, or as a partner with *A.* on the joint effects of *A.* and *B.* or either of them, and that they might commence an action at law either against *A.* jointly with *B.*, or *A.* separately, for the purpose of enabling the plaintiffs to recover payment from the joint estate of *A.* and *B.*, or from *B.*'s separate effects; and the plaintiffs brought an action of *assumpsit* for money paid against both, and *A.* pleaded

REPLEVIN.

the release, on which the plaintiffs set it out on oyer in their replication, and averred that the action was prosecuted against both, for the purpose of enabling the plaintiffs to enforce payment from *A.* and *B.* either from their joint estate, or the separate estate of *B.*:—*Held*, on demurrer thereto, that the action was authorized by the deed, and the Court over-ruled the demurrer. *Semble*, that such replication is no departure from the declaration. *Solly v. Forbes*, *E. 1 G. 4.*

Page 448

REMAINDER.

See ELECTION, 1.

RENT.

See LAND TAX, 1.

PLEADING, 2, 3.

REPLEVIN, 2.

SHERIFF, 2.

REPLEVIN.

See COSTS, 2, 3.

ELECTION, 1.

PLEADING, 1, 3.

1. *A.* and *B.* were in partnership as attorneys. *A.* alone was appointed replevin clerk to the sheriff:—*Held*, that an action for the expences of preparing a replevin bond must be brought by *A.* alone, although it was executed in the office where he and *B.* carried on their joint business. *Brandon v. Hubbard*, *E. 1 G. 4.* 367

2. In an action by the assignee of the sheriff on a replevin bond, conditioned for the plaintiff in replevin to appear at the county Court, and prosecute his suit with effect, and make a return of the goods distrained, if it should be

RETURN OF WRITS. 645

adjudged, and the plaintiff in replevin, after removing the plaint into this Court, became nonsuit: *Held*, that he had not thereby prosecuted his suit with effect, and that the condition of the bond was broken; and that the avowant had his election of proceeding by a writ *de retorno habendo*, or issuing a writ of inquiry, under the statute 17 *Car. 2. c. 7. s. 2.* Therefore, where to a declaration against one of the sureties in the bond, averring, that the plaintiff in replevin did not prosecute his suit with effect; a plea stating the writ of inquiry and judgment to recover the arrears of rent found under 17 *Car. 2.* is no bar to the action on the bond, and is bad on general demurrer, in not shewing that any execution had issued on the judgment, or that the sum recovered had been levied and paid to the avowant before action brought. *Turnor v. Turner*, *T. 1 G. 4.*

Page 608

3. If judgment be given against the plaintiff in replevin for not prosecuting his suit with effect, his sureties in the bond will be answerable to the avowant, notwithstanding he has afterwards proceeded on the 17 *Car. 2. c. 7. s. 2.* and obtained a judgment under a writ of inquiry, in pursuance of that statute, to recover the arrearages of rent and costs. *Turnor v. Turner*, *T. 1 G. 4.*

606

REPLICATION.

See RELEASE, 2.

REPUTED OWNERSHIP.

See BANKRUPT, 7.

RETURN OF WRITS.

See SHERIFF.

U U

REVERSION.

See ELECTION, 1.

EVIDENCE, 2.

MARRIAGE SETTLEMENT, 1.

RULE TO PLEAD.

See ESCAPE, 1.

SALE.

See TROVER, 1.

WITNESS, 5.

SALE OF GOODS.

See AGENT, 2.

SCHEDULE.

See FINE, 3.

SCIRE FACIAS.

See PLEADING, 1.

SECURITY FOR COSTS.

See COSTS, 2, 3.

SESSIONS.

See ARREST, 1.

EVIDENCE, 1.

JUSTICE OF PEACE, 2.

SET OFF.

See GUARANTEE, 1.

SHERIFF.

1. A sheriff may apply to the Court for a rule to enlarge his return to a *venditioni exponas*, from Term to Term, if the defendant become bankrupt, unless he be indemnified by the assignees in paying over the money levied under it, or the rule for such enlargement be duly discharged. *Venables v. Wilks*, E. 1 G. 4.

Page 339

2. In an action against the sheriff for removing goods under an exe-

cution, without satisfying the landlord's claim of a year's rent: *Held*, first, that a trustee of an outstanding satisfied term, in trust for mortgagees, and to attend the inheritance, must be considered a landlord within the statute 8 Anne, c. 14. s. 1. and entitled to maintain such action. Secondly, that a notice to the sheriff, before the removal, stating that a year's rent was due from the tenant to the mortgagor (naming him), and the mortgagees of his estates, and signed by the receiver of the rents, is sufficient, although such receiver was not appointed by the mortgage-deed. Thirdly, that it was the duty of the sheriff to levy for the rent in the first instance, and then for the execution; and he must retain a sufficient sum to satisfy such rent, before he remove any of the goods from off the premises. *Colyer v. Speer*, T. 1 G. 4.

Page 473

3. Where a sheriff returned to a writ of *feri facias*, that he had money in his hands ready to be paid over to the plaintiffs, whereas it had been paid over through the misconduct of his officer, to the solicitor of a commission of bankrupt, issued against the defendant (the original debtor) and under which commission one of the plaintiffs was appointed assignee, who knew, and did not object to such payment:—*Held*, that this amounted to an assent, on the part of such plaintiff, to ratify the payment, and consequently that the sheriff was not liable to pay over to both the plaintiffs the sum which he stated to have received for them in his return. *Tomlinson v. Skynn*, T. 1 G. 4.

505

STAMPS.

SHIP.

- See **BANKRUPT**, 7.
BILLS OF LADING.
JUSTICE OF PEACE, 1.

SHIP OWNER.

- See **ASSUMPSIT**, 1.
BANKRUPT, 7.
BILLS OF LADING.
JUSTICE OF PEACE, 1.
PLEADING, 1.
PRACTICE, 2.
REFLEVIN, 1.
TROVER, 1.
VARIANCE, 2.

SPECIAL JURY.

See **JURY**.

STAMPS.

- See **AFFIDAVIT**, 2.
ATTORNEY, 3.
FRAUDS, STATUTE OF, 1.
RECOVERY, 5.

1. A promissory note, reciting that "the defendant had been awarded to pay 500*l.* to the representatives of *J. S.* and that he had paid him 100*l.* in his life-time, and thereby promised to pay his representatives 400*l.* three months after his death, pursuant to the award, first deducting thereout any interest or money *J. S.* might owe to the defendant on any account," may be given in evidence in an action brought by the representatives of *J. S.* against the defendant, on an account stated between him and *J. S.* although it was improperly stamped as a promissory note. *Barlow v. Broadhurst*, *T. 1 G. 4.* Page 471
2. By 55 Geo. 3. c. 184, *Sched. part 2*, orders for the payment of money out of any particular fund which may or may not be avail-

STATUTES.

647

able, or upon any condition or contingency which may or may not be performed, are to be placed on the same footing as bills of exchange. Therefore, a letter from *A.* to *B.* requesting him to pay to *C.* and *Co.* or their order, 600*l.* out of the first proceeds of a stock of gunpowder, then in the hands of *B.* and to charge the same to the account of *A.* although followed by a subsequent correspondence between the parties, was held to require a stamp, as an order for the payment of money within the provisions of that statute, and consequently that an agreement stamp, affixed on payment of a penalty, was improper. *Butts v. Swan*, *T. 1 G. 4.* Page 485

STATUTE OF LIMITATIONS.

See **LIMITATION OF ACTIONS**.

STATUTES.

- See **BANKRUPT**, 7.
INCLOSURE ACT, 1.

STATUTES—CITED OR COMMENTED ON.

Edward 3.

1. c. 16. Justice of Peace. 200. 232
2. c. 3. Justice of Peace. 251
4. c. 7. Executors—Trespass. 535
25. c. 4. Restraining Statute. 218
34. c. 1. Justice of Peace. 233
42. c. 3. Justice of Peace. 203 576

Richard 3.

1. c. 3. Justice of Peace. 260

Henry 7.

3. c. 3. Justice of Peace—Bail. 260

Henry 8.

| | |
|----------------------------------|----------|
| 7. c. 4. s. 3. Replevin—Costs. | Page 297 |
| 21. c. 19. s. 3. Replevin—Costs. | 297 |
| 32. c. 34. Assignee—Reversion. | 395 |
| — c. 37. Distress—Replevin. | 411 |

Philip & Mary.

| | |
|---|-----|
| 1 & 2. c. 12. s. 3. Distress—Replevin. | 367 |
| — c. 13. s. 4. Justice of Peace—Prisoner. | 203 |
| 2 & 3. c. 10. Justice of Peace. | 203 |

Elizabeth.

| | |
|--|--------|
| 5. c. 4. s. 39. Justice of Peace—Jurisdiction. | 206 |
| 13. c. 7. s. 1. Bankrupt. | 420, 1 |
| 23. c. 3. s. 2. Recovery. | 349 |
| — s. 5. Recovery. | 349 |
| — c. 10. Game—Justice of Peace. | 206 |
| 27. c. 13. Hue and Cry. | 467 |
| 43. c. 2. s. 19. Poor Rate—Costs. | 296, 8 |

James 1.

| | |
|---------------------------|----------|
| 1. c. 15. s. 2. Bankrupt. | 141. 325 |
| 21. c. 4. Penal Action. | 204 |
| — c. 19. s. 11. Bankrupt. | 549. 551 |
| | 561 |

Charles 1.

| | |
|------------------------------|-----|
| 16. c. 10. Justice of Peace. | 576 |
|------------------------------|-----|

Charles 2.

| | |
|------------------------------|----------|
| 17. c. 7. Distress—Replevin. | 411, 412 |
| — s. 2. Distress—Replevin. | 606 |
| 22 & 23. c. 1. Coventry Act. | 254 |

William & Mary.

| | |
|---------------------------------------|--------|
| 1. sess. 2. c. 2. s. 2. | 576 |
| 2 & 3. sess. 1. c. 5. s. 4. Distress. | 297, 8 |

William 3.

| | |
|--|----------|
| 8 & 9. c. 11. s. 8. Suggestion of Breaches | Page 153 |
| — c. 27. s. 12. Warden of the Fleet. | 425, 429 |

Anne.

| | |
|------------------------------------|----------|
| 4. c. 16. s. 1. Traverse—Jeofails. | 308 |
| — s. 12. Pleading—Jeofails. | 165 |
| — s. 16. Entry on Lands. | 611 |
| 5. c. 14. s. 4. Game. | 343 |
| 8. c. 14. s. 1. Execution—Rent. | 473, 476 |
| 9. c. 25. s. 2. Game. | 343, 345 |

George 2.

| | |
|---|---------------|
| 2. c. 23. s. 10. Attorney. | 603 |
| — s. 23. Attorney's Bill | 4 |
| 5. c. 30. s. 7. Bankrupt. | 353 |
| — s. 28. Bankrupt. | 515, 518. |
| | 527. 530, 531 |
| 11. c. 19. s. 23. Replevin Bond. | 368. 609, 612 |
| 22. c. 46. s. 11. Attorney. | 603 |
| 24. c. 44. s. 36, 8. Constable—Demand of Warrant. | 465, 6, 7, 8 |
| 30. c. 19. s. 75. Attorney's Bill. | 4 |

George 3.

| | |
|--|--------------------|
| 2. c. 28. Bum Boat Act. | 30 |
| ii. c. lxxvii. Tolls—Turnpike. | 371, 4, 6, 7, 8, 9 |
| 13. c. 63. ss. 40. 44. East India Company—Witness. | 313, 314 |
| 13. c. 78. Highways. | 51, 4. 63 |
| 21. c. 55. s. 47. Justice of Peace. | 56 |
| 21. c. 64. Justice of Peace. | 56 |
| 26. c. 60. s. 17. Ship's Register. | 549. 552 |
| 31. c. 25. s. 19. Stamps. | 490, 2 |
| 34. c. 68. ss. 15, 16. Ship's Register. | 552 |
| 35. c. 63. s. 13. Stamps—Policy of Insurance. | 43 |

TIME, COMPUTATION OF.

- xxxvi. c. lxi. Inclosure Act.
Page 99. 103
36. c. 52. ss. 6. 8. Legacy Duty.
21. 23. 24
43. c. 46. Costs—Arrest. 167
— c. 141. Justice of Peace. 61
44. c. 96. s. 7. Stamps. 472
45. c. 28. s. 5. Legacy Duty. 24
48. c. 58. s. 1. Indictment—Jurisdiction. 207
xlx. c. xxviii. Tolls—Turnpike.
371, 8, 9
49. c. 121. s. 2. 515. 520, 3, 7, 8.
531
54. c. 187. s. 22. Boats—Justice
of Peace. 54
55. c. 184. *Sched. part 1.* 472. 489.
493, 4, 8, 9
59. c. 64. Warden of the *Fleet*.
426, 429

STRANDING.

See INSURANCE, 3.

SUBPCENA.

See WITNESS, 1.

SURETY.

See BILLS OF EXCHANGE, 1.

BOND.

JUSTICE OF PEACE, 2.

LEGACY DUTY, 1.

REPLEVIN, 2.

TAXES.

See LAND TAX.

TENANT IN FEE.

See MARRIAGE SETTLEMENT, 1.

TENANT IN TAIL.

See MARRIAGE SETTLEMENT, 1.

TIME, COMPUTATION OF.

1. Where a distress for poor rates
was made by a parish officer,

TRADER. 640

on the 6th of *June*, and the
action not commenced against
him till the 6th of *December* fol-
lowing:—*Quære*, whether it
was brought within six calendar
months after the act committed,
as required by the eighth section
of 24 *Geo. 2.* c. 44.? *Clarke v.*
Davey, *E. 1 G. 4.* Page 465

TITHES.

See FINE, 4.

RECOVERY, 7.

TITLE.

See PLEADING, 5.

TOLLS.

1. Where, by a local turnpike act,
2 *Geo. 3.* c. 67, a certain toll was
imposed on carriages, and not
on the horses drawing them, with
a provision, that no persons hav-
ing paid such tolls, and producing
a ticket, should be again liable on
the same day—and by a subse-
quent local act, 49 *Geo. 3.* c. 28,
reciting the former one, the old
tolls were repealed, and others
imposed, in respect of the horses
drawing, and not on the car-
riages, but all the provisions of
the former act were to be conti-
nued as fully as if they had been
re-enacted:—*Held*, that toll hav-
ing been paid on horses passing
with a carriage, no new toll was
demandable on the same horses
returning the same day, although
drawing a different carriage.
Gray v. Shilling, *E. 1 G. 4.* 371

TRADE.

See INSURANCE, 1. 2. 4.

TRADER.

See BANKRUPT, 5.

TURNPIKE.**TRAVERSE.***See* COSTS, 1.**TRESPASS.***See* CONSTABLE, 1.*COSTS*, 1.*JUSTICE OF PEACE*, 1. 2. 3.**TROVER.***See* AGENT, 2.*BANKRUPT*, 1.*WITNESS*, 5.

1. The owner of a ship consigned her to persons abroad, who hypothecated her, and directed the captain to 'sign a bottomry bond. On her arrival in *London*, he, by their direction, delivered the register to the defendant (the agent of the consignees), who gave it to their solicitor, to institute proceedings in the Court of Admiralty, on the bottomry bond. The ship was sold by order of that Court, and the register decreed to be given up to the purchaser. The owner became bankrupt, and his assignees brought an action of trover for the register:—*Held*, that they could not recover, as they might have appeared in the Admiralty Court, and prevented the sale of the vessel, and as the delivery of the register to the purchaser, under the decree of that Court, was not a conversion. *Hossack v. Masson*, *E. 1 G. 4. Page 361*

TRUSTEES.*See* BANKRUPT, 2. 3.*SHERIFF*, 2.**TURNPIKE.***See* TOLLS, 1.**VARIANCE.****UNDERWRITER.***See* INSURANCE.**USES, STATUTE OF.***See* ELECTION.**USURY.**

1. If *A.* be indebted to *B.* in 80*l.*, and give a promissory note for 87*l.* 3*s.*, payable by four quarterly instalments (being the amount of principal and interest to the time of the last instalment), and that in case default should be made in payment of any one instalment, the whole sum should become payable:—*A.* is entitled to recover the whole of such sum, on default being made in payment of the first instalment, as it is a stipulation between the parties in nature of a penalty, and therefore not a usurious contract or agreement. *Wells v. Girling*, *M. 60 G. 3. Page 78*

VACANT POSSESSION.*See* EJECTMENT.**VARIANCE.**

1. In covenant on a lease for not repairing, the instrument was described in the declaration to be made by the plaintiff, of the one part, and the defendant, of the other. On the production of the lease in evidence, it appeared to have been made between the plaintiff and his wife, of the one part, and the defendant, of the other:—*Held*, that this was no variance, although the premises demised were the property of the wife before marriage. *Arnold v. Revault*, *M. 60 G. 3. 66*

VARIANCE.

2. Whenever a party seeks to recover for a breach of duty, arising from an employment, such employment must be stated truly in the declaration, and proved as laid, whether the action be framed in *assumpsit* or *tort*. Therefore, where a count in a declaration *ex delicto* stated, that "the plaintiff, as owner of a ship, had retained and employed the defendant as his agent, to cause her to proceed to *Gottenburgh*, in order that she might afterwards proceed to *St. Petersburg*, and that the defendant accepted the retainer;"—and it was proved at the trial, that a written arrangement had been entered into between the plaintiff's clerk or agent, and the defendant, that the ship should touch at *Gottenburgh*, to know the state of things in *Russia*, and receive instructions:—*Held*, that this was a fatal variance, as the defendant had not undertaken to proceed to *St. Petersburg* absolutely, and at all events. *Lopes v. De Tastet*, H. 60 G. 3. and 1 G. 4.

Page 266

3. In *assumpsit* on a guarantie, the declaration stated, that the defendants undertook to indemnify A. from holding goods in his warehouse on their behalf, and delivering the same up to them, when requested so to do. On the production of the instrument, it appeared, that the defendants only guaranteed him for holding the goods in his warehouse on their behalf:—*Held*, that this was no variance, as it must be implied, that he was to deliver them up to the defendants. *Sampson v. Burton*, T. 1 G. 4.

515

WITNESS.

681

VENDITIONI EXPONAS.

See SHERIFF, 1.

VENDOR AND PURCHASER.

See AGENT, 2.
PLEADING, 5.

WARDEN OF THE FLEET.

See ESCAPE, 1.

WARRANT.

See CONSTABLE, 1.
JUSTICE OF PEACE, 1.

WARRANT OF ATTORNEY.

See RECOVERY, 4.

1. The *essoign* day cannot be considered as a day within the Term, on which an application can be made to enter up judgment on an old warrant of attorney, on an affidavit stating the party to be alive on that day. *Anonymous*, M. 60 G. 3. Page 2

WARRANTY.

See ASSUMPSIT, 2.
INSURANCE, 4.

WASTE.

See FIXTURES.

WILL.

See ELECTION.

WINDMILL.

See EXECUTION, 1.

WITNESS.

1. A witness attending a trial under a *subpoena*, is not entitled to a compensation for his loss of time, although the party requiring his

attendance expressly promised to pay him for such loss. *Willis v. Peckham*, H. 60 G. 3. and 1 G. 4.

Page 300

2. By 13 Geo. 3. c. 63. s. 44, it is enacted, that when and as often as the *East India Company*, or any person, shall commence and prosecute any action at law, for which cause has arisen in *India*, against any other person, in any of his Majesty's Courts at *Westminster*, such Court, on motion, may award a writ of *mandamus* for the examination of witnesses in *India*:—*Held*, that a defendant might apply for such writ as well as a plaintiff. *Grillard v. Hogue*, H. 60 G. 3. and 1 G. 4.

313

3. And under a commission issued to examine witnesses abroad, it is no objection that a clerk to the plaintiff's attorney is appointed one of the Commissioners, and settles the draft of the deposition of one of the plaintiff's witnesses. *Lopes v. De Tastet*, E. 1 G. 4.

424

4. Communications made by a party to an attorney are confidential, although they do not relate to a cause existing, or in progress, at the time they were made. Therefore, where an attorney was applied to by a father, to prepare a deed by which his property was to be assigned to his son, and who stated, that there was no consideration for the assignment, on which the attorney

WRIT OF ENTRY.

refused to prepare it, and it was afterwards drawn by another:—*Held*, that such attorney was precluded from giving evidence of that fact, in an action brought by the son, in which the validity of the deed was attempted to be disputed, although he was not employed in the cause. *Cromack v. Heathcote*, E. 1 G. 4. Page 357

5. In trover by the assignees of a bankrupt, for goods alleged to have been placed in the hands of the defendants for sale, by the bankrupt, before his bankruptcy, and on his account; and the defendants, in order to prove that the goods had been pledged by the bankrupt to C. and Co. for the repayment of money advanced to him thereon, and that the defendants had become legally responsible to them for the money to be produced by the sale. *Quare*, whether a partner in the house of C. and Co. be admissible as a witness for the defendants, to shew under what circumstances the advances were made by that house to the bankrupt? *Butts v. Swan*, T. 1 G. 4.

484

WRIT.

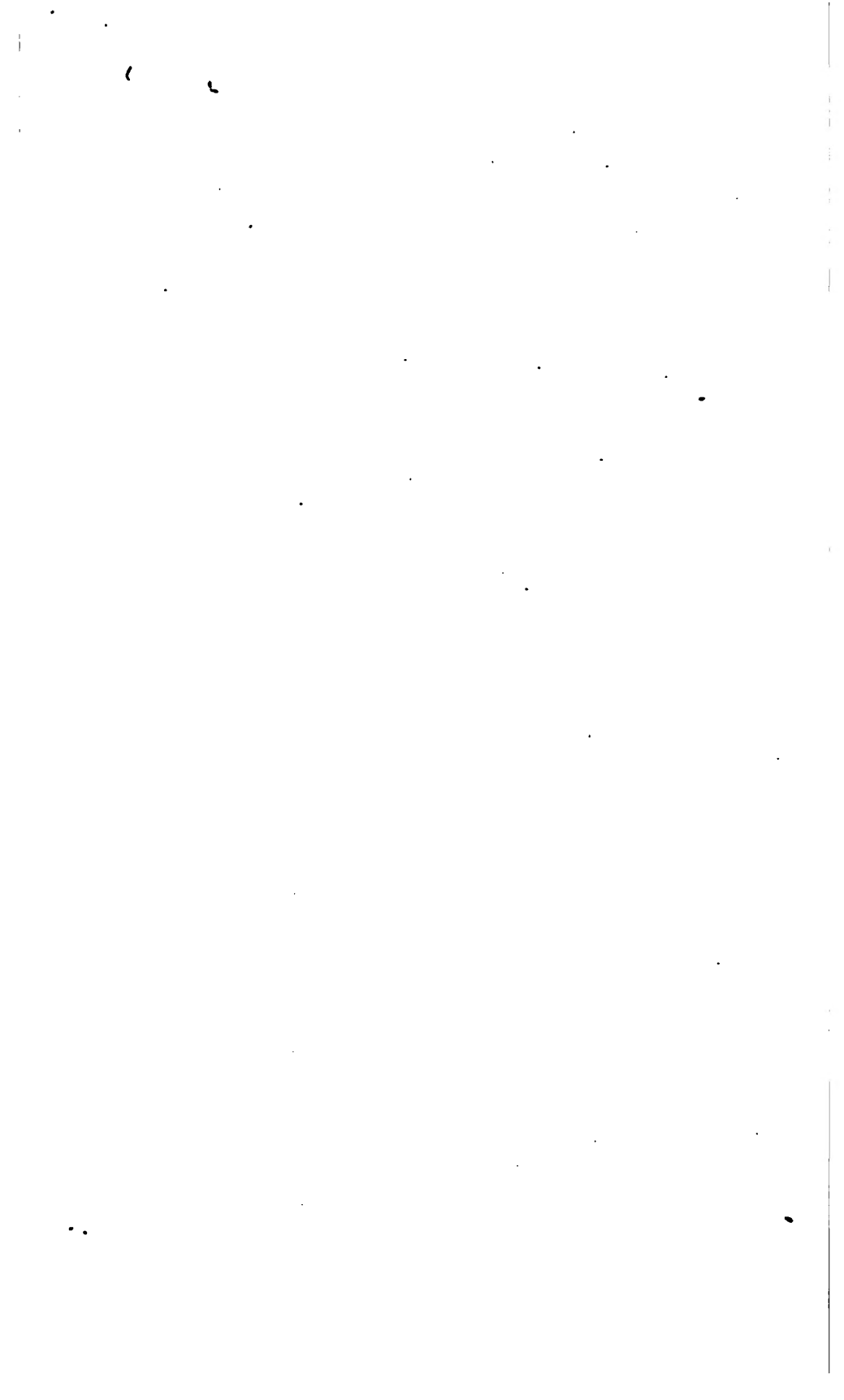
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PLEADING, 1.
PRACTICE, 1.

WRIT OF ENTRY.

See RECOVERY.

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